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*(Article begins on next page)*

# A SOLUTION HIDING IN PLAIN SIGHT: SPECIAL EDUCATION AND BETTER OUTCOMES FOR STUDENTS WITH SOCIAL, EMOTIONAL, AND BEHAVIORAL CHALLENGES<sup>†</sup>

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<sup>†</sup> The ideas and arguments in this Article were previously presented at the Special Education Law Symposium, “Examining the IDEA in Theory and Practice” at Pepperdine University School of Law on February 10, 2012, and at the Disability Symposium, “Including Disability: How Legal Discourse Can Shape Life’s Transitions” at UCLA School of Law on March 22, 2013; we thank the participants in these conferences for their valuable input. We are also particularly grateful to Robert Dinerstein and Ruth Colker who provided extremely helpful feedback. Finally, we wish to thank Alexandra Bochte, Matthew Bernstein, and Kelly Davis for their excellent research assistance. Any errors or oversights that remain are ours.

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### INTRODUCTION

Anthony,<sup>1</sup> a nine-year-old African-American boy, was asked by his teacher to write an essay about his family. In addition to the frustration he felt because of his difficulty spelling and writing in complete sentences, this assignment also triggered flashbacks to an event that had occurred a year earlier—he started picturing his father viciously beating his mother and leaving her lying on the floor helpless. Anthony remembered walking over to his mother after his father left the house and finding her unresponsive. He also recalled waiting for the paramedics after he dialed 911 and the chilling feeling he had after they arrived and pronounced her dead. As these events flashed through his mind, Anthony flew into a rage. He began yelling and cursing at the teacher. He flipped a desk over. Immediately, the teacher told the students to leave the classroom and called the school resource officer. Anthony was arrested and taken to Juvenile Hall. After remaining there for several days, he was admitted to a mental health institution for a few weeks, and then released to the group home where he had been living for the previous three months. As a result of this incident, Anthony faced exclusion from school and a delinquency case that could remove him from his community for up to a year.

The desk incident was not an isolated one for Anthony. On numerous occasions, he had outbursts in the classroom where he threw books, pencils or other small objects. He was routinely suspended for fights with other students or for talking back to teachers and staff. Shortly after he witnessed his mother's death, he was placed in the foster care system. In one year, he lived in four different foster homes. Through the services of the dependency system, he was diagnosed with Post-Traumatic Stress Disorder, Bipolar Disorder, and a learning disability, but these disabilities were never identified or addressed by his school. He still dreamed of being an engineer, a career in which he could put his superior math skills to

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1. Anthony's story and the many case stories recounted in this Article are the real experiences of actual client families with whom we have worked in our various legal clinics and legal services organizations. See *infra* note 2 for a description of the settings in which we practice. All of the families we discuss reside in low-income, urban communities, and the majority of them are African American, Latino, and other families of color. Many of the families we represent have immigrated to the United States and several have children who are English Language Learners. In each of the stories we share, the names that we use are pseudonyms. In some instances, we have also changed certain identifying facts to protect the anonymity of our clients where doing so does not alter the relevance of their experiences to the point we are making.

use, but his impending school expulsion and incarceration only moved him further from that dream.

Sadly, in urban, low-income, minority communities, stories like Anthony's are not uncommon. Our work as clinical law teachers<sup>2</sup> who—alongside our law students—provide direct representation to families in the special education system gives us the opportunity to see up close how institutional failures in the implementation of the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> play a major contributing role in poor outcomes for many students with social, emotional and behavioral challenges.<sup>4</sup> As we near the time when

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2. Professor Cannon currently teaches in the Community Lawyering Clinic at University of New Mexico School of Law, <http://lawschool.unm.edu/clinic/clinic-sections/community/index.php> (last visited Dec. 18, 2013), a medical-legal partnership addressing a broad array of legal needs facing low-income children and families, including special education. Prior to that, she was a Practitioner-in-Residence at the American University Washington College of Law in Washington, D.C., where she supervised students in the Disability Rights Law Clinic, <http://www.wcl.american.edu/clinical/disability.cfm> (last visited Dec. 18, 2013), to represent low-income people with disabilities and their family members, including providing special education advocacy. Professor Gregory teaches in the Education Law Clinic at Harvard Law School, <http://www.law.harvard.edu/academics/clinical/clinics/education.html> (last visited Dec. 18, 2013), where he and his law students represent low-income families in the special education system. This Clinic is part of a larger collaboration between Harvard Law School and Massachusetts Advocates for Children, a non-profit child advocacy organization in Boston, called the Trauma and Learning Policy Initiative (TLPI), [traumasensitiveschools.org](http://traumasensitiveschools.org) (last visited Dec. 18, 2013). The children for whom the Clinic advocates all have had some form of traumatic experience that is interfacing with the disabilities that qualify them for special education. Professor Waterstone is the Director of the Children's Rights Clinic at Southwestern Law School in Los Angeles, <http://www.swlaw.edu/academics/clinic/childrensrightsclinic> (last visited Dec. 18, 2013), which represents children in school discipline proceedings, represents children with disabilities in special education proceedings, and works with community groups to advocate for better and more equitable educational opportunities for children.

3. 20 U.S.C. §§ 1400–1482 (2012).

4. A common trait among many of the students for whom we advocate is that they experience some form of social, emotional or behavioral challenges in school. Therefore, we employ the phrase “students with social, emotional, and behavioral challenges” throughout this Article to describe these students. There is not one disability category that encapsulates all of these students—they have mental health disabilities, learning disabilities, developmental or intellectual disabilities, and/or any combination thereof. Many of our students qualify as having an “emotional disturbance,” defined by federal regulations as

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors[;] (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers[;] (C) Inappropriate types of behavior or feelings under normal circumstances[;] (D) A general pervasive mood of unhappiness or

Congress is expected to begin work on reauthorizing the IDEA<sup>5</sup>, the voices of students like Anthony and their families must be front and center. We must learn from their experiences if we truly hope to close the achievement gap for students with disabilities.

It is easy enough to look at the research and see that something is amiss. Students with social, emotional and behavioral challenges—particularly low-income students and students of color—are over-represented in a host of adverse outcomes. For example, social, emotional and behavioral challenges in school are associated with lower academic achievement and reduced participation in positive post-school experiences such as employment, secondary education and independent living.<sup>6</sup> While still in school, evidence shows that these students are also more likely to be suspended or expelled than their classmates.<sup>7</sup> A combination of lower achievement and frequent disciplinary removals sets the stage for these students to drop out of school at rates that are significantly higher than the general student population.<sup>8</sup> Both during school and after they leave, these students are at increased risk for involvement with the juvenile justice system.<sup>9</sup> For those students with the most severe social, emotional and behavioral problems, studies show that admission to inpatient psychiatric hospitals and other institutional settings is also alarmingly common.<sup>10</sup> The picture painted by these poor outcomes is not a

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depression[; and/or] (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i) (2012). However, not all of our students have been identified as eligible for special education under this category, and some of them experience social, emotional, and behavioral challenges in the classroom as a result of frustrations associated with *other* unaddressed disabilities. Federal regulations also state that services and placements must be based on the child's unique needs and not on the child's disability. *Id.* § 300.300(3)(ii). Therefore, our students who have social, emotional and behavioral needs and are otherwise IDEA-eligible must be provided with services and accommodations to address this set of needs regardless of the disability category under which they happen to qualify. This Article and its suggestions for reform are relevant to all disabled students with social, emotional, and behavioral challenges regardless of their particular disability category.

5. See NAT'L SCH. BDS. ASS'N, ISSUE BRIEF: INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION 1 (2013), available at <http://www.nsba.org/Advocacy/Key-Issues/SpecialEducation/NSBA-Issue-Brief-Individuals-with-Disabilities-Education-Act-IDEA.pdf> (noting that while reauthorization was scheduled to take place in 2011, it could be delayed until 2014 or later).

6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. See *infra* Part I.C.

9. See *infra* Part I.D.

10. See *infra* Part I.E.

subtle one, but it is incomplete. While a look at the relevant social scientific studies is enough to establish that there is a problem, the much more difficult task is figuring out exactly *how* and *why* things are going awry for these particular students.

Of course, the great irony in the statistics—and in stories like Anthony’s—is that a robust system of substantive and procedural entitlements already exists to help these students avoid poor outcomes.<sup>11</sup> The IDEA provides every “child with a disability”<sup>12</sup> an extraordinarily rich, if somewhat ambiguously defined, right to a free appropriate public education (FAPE).<sup>13</sup> This right includes an

11. See 20 U.S.C. § 1400(d)(1)(A) (2012) (declaring that one of the purposes of the IDEA is to prepare students with disabilities for the positive outcomes of “further education, employment and independent living”).

12. See *id.* § 1401(3)(A) (defining an eligible child as one “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, needs special education and related services”).

13. The IDEA defines FAPE as

special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

§ 1401(9). This definition offers minimal guidance for knowing what constitutes FAPE for a particular child, giving local educational agencies (LEAs) considerable discretion and leaving much to the interpretation of administrative agencies and courts. See, e.g., Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 180 (2005) (“The legal standard of FAPE is unavoidably vague, and it is impossible to know ex ante to what services any given child will be deemed entitled if the dispute is litigated.”). The Supreme Court first interpreted the FAPE standard in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, in which it held that FAPE requires “personalized instruction with sufficient support services to permit the child to benefit educationally.” 458 U.S. 176, 203 (1982). This holding has been further interpreted by the federal circuit courts, which have tended to require that FAPE allow students to receive meaningful educational benefit. See, e.g., *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988) (FAPE requires that the IEP provides “significant learning” and confers “meaningful benefit”). Notwithstanding the ambiguity that remains in these interpretations of the statutory definition, there is a well-elaborated body of case law emanating from lower courts and from state administrative agencies that further sketches the contours of the entitlement. The advantage for parents and students of the somewhat amorphous statutory standard is that it has been construed by hearing officers and judges to encompass a wide array of services, accommodations and educational placements. See, e.g., *In re Arlington Pub Sch.*, 37 IDELR 119, 500–01 (Mass. State Educ.

individualized education program (IEP) that outlines all of the specialized instruction,<sup>14</sup> related services,<sup>15</sup> and accommodations<sup>16</sup> the student is supposed to receive, along with individualized and measurable annual goals<sup>17</sup> to monitor progress. When parents or students disagree with an IEP the school district proposes, they are entitled to access a system of procedural mechanisms designed to help them resolve the dispute.<sup>18</sup> Congress has required states to offer mediation,<sup>19</sup> to maintain a state complaint system,<sup>20</sup> and to provide full due process hearings<sup>21</sup> to settle disputes in special education. Families that remain aggrieved can pursue their claims in state and federal court.<sup>22</sup> Clearly, the problem is not that public policy has ignored this population—as it largely did, regrettably, until 1975.<sup>23</sup> Rather, the problem is that somehow the promise of this powerful federal-state legal regime remains unrealized for certain students.

A substantial body of literature attempts to grapple with the challenges facing students with disabilities and advances various critiques of the IDEA, such as confusion surrounding determinations of eligibility for special education,<sup>24</sup> disappointment with changes made in the 2004 reauthorization,<sup>25</sup> difficulties with enforcement,<sup>26</sup>

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Agency, July 23, 2002) (reviewing cases and other authorities that outline the contours of the FAPE standard for Massachusetts).

14. See § 1401(29) (defining special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education”).

15. See § 1401(26).

16. See *id.* § 1414(d)(1)(A)(i)(VI)(aa).

17. See § 1414(d)(1)(A)(i)(II).

18. See *id.* § 1415.

19. See § 1415(b)(5) & (e).

20. See 34 C.F.R. § 300.151 (2012).

21. See 20 U.S.C. § 1415(b)(6) & (f).

22. See § 1415(i)(2).

23. Congress acknowledged as much in the findings section of the IDEA: “Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met . . .” *Id.* § 1400 (c)(2). For a general account of the educational conditions faced by children with disabilities prior to 1975, see, for example, RUTH COLKER, *DISABLED EDUCATION* 17–26 (2013).

24. See, e.g., Ruth Colker, *The Learning Disability Mess*, 20 AM. U. J. GENDER SOC. POL’Y & L. 81, 83 (2011); Robert A. Garda, Jr., *Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 293 (2006); Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 448 (2004); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009).

25. See, e.g., Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006).



over-representation of minority students in special education overall and in certain eligibility categories,<sup>27</sup> unequal access to special education and enforcement mechanisms for low-income students and families,<sup>28</sup> and the failure of IDEA to keep students with disabilities out of the juvenile justice system.<sup>29</sup> While critiques and proposals to remedy the law abound, what has been missing from the conversation is a more granular exploration of how the system of substantive and procedural entitlements created by the existing law is actually working (or not) for low-income families with children who experience social, emotional and behavioral challenges.<sup>30</sup> As

26. See, e.g., Samuel Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121–37 (Joshua M. Dunn & Martin R. West eds., 2009); Caruso, *supra* note 13, at 176–77; Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 502 (2013); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1417 (2011).

27. See, e.g., BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? (2006); DANIEL J. LOSEN & GARY ORFIELD, RACIAL INEQUITY IN SPECIAL EDUCATION (2002); Martha J. Coutinho & Donald P. Oswald, *Disproportionate Representation in Special Education: A Synthesis and Recommendations*, 9 J. CHILD & FAM. STUD. 135 (2000); John L. Hosp & Daniel J. Reschly, *Referral Rates for Intervention or Assessment: A Meta-Analysis of Racial Differences*, 37 J. SPECIAL EDUC. 67 (2003); Russell J. Skiba, et al., *Achieving Equity in Special Education: History, Status and Current Challenges*, 74 EXCEPTIONAL CHILDREN 264 (2008); J.S. de Valenzuela et al., *Examining Educational Equity: Revisiting the Disproportionate Representation of Minority Students in Special Education*, 72 EXCEPTIONAL CHILD. 425 (2006).

28. See, e.g., COLKER, *supra* note 23; Pasachoff, *supra* note 26 at 1417; Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 107, 109–10 (2011).

29. See, e.g., Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909 (2009/2010); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3 (2003).

30. COLKER, *supra* note 23, comprehensively reviews special education administrative and judicial decisions to catalogue how the law has affected real families—including those whose children have social, emotional, and behavioral challenges. The families represented in these decisions, however, do not necessarily reflect the experiences of the families we represent, who most often do not have the means to access administrative agencies and courts. Professor Colker has noted that “cases that reached the Supreme Court were typically stories of white middle-class children.” COLKER, *supra* note 23, at 239. In addition, the facts contained in written decisions are filtered through the perspective of the fact-finder and do not necessarily capture the situation as experienced firsthand by the family. Hyman, et al., *supra* note 28, provide direct examples from legal practice of how the law often fails to meet the needs of their low-income clients; however, they do not focus specifically on low-income students with social, emotional and behavioral challenges. This Article

Professor Ruth Colker has acknowledged, the stories of low-income and minority children and families in the special education system are “with rare exceptions, invisible” in reported case law, and yet their stories must inform the ongoing evolution of the IDEA and of special education practice.<sup>31</sup>

This Article will contribute to the ongoing dialogue about special education and the IDEA in two ways. First, it will describe patterns that have emerged from our work with individual children and families that shed light on how common IDEA implementation failures increase the risk of poor outcomes for students with social, emotional and behavioral challenges. Critiques of the law and proposals to amend it should be grounded in an understanding of exactly how and why it is falling short of meeting its promise to these children. Our hope is that mapping the common implementation failures we have seen in our cases will advance this understanding—at least with respect to the particular population of students for whom we advocate—and will help guide the development of public policy. Second, this Article will assert that fixing these common implementation failures is a critical reform and a worthwhile investment of public time, money and attention. While proposing specific legislative remedies or strategies is beyond the scope of this Article, we will suggest some priorities for reform that appear warranted based on our work.

This Article proceeds in three parts. Part I explores the poor outcomes that children with disabilities, and particularly those with social, emotional and behavioral needs, are likely to face. In Part II, the Article maps some of the key provisions of the IDEA that hold particular promise for addressing the needs of these students, but uses examples from our direct representation of clients to show how these provisions are often not fully implemented by schools and districts. Part III outlines a set of reforms to facilitate implementation at the school level of these key provisions and also addresses some critiques of special education and of IDEA expressed by those who doubt the promise the law holds for these students. We contend that full implementation of these key provisions can result in better educational outcomes for students with disabilities who experience social, emotional and behavioral challenges.

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attempts to fill a gap in the literature by articulating the actual experiences of families who are low-income *and* have children with social, emotional, and behavioral challenges.

31. *Id.* at 239.

## **I. POOR OUTCOMES FOR STUDENTS WITH SOCIAL, EMOTIONAL AND BEHAVIORAL CHALLENGES**

Children with disabilities, especially those with social, emotional, and behavioral challenges, are more likely to experience a number of poor outcomes: low achievement, suspensions and expulsions, school dropout, involvement in the juvenile justice system, and psychiatric hospitalization and residential treatment. The children for whom we advocate—primarily African American and Latino students, who live in low-income urban communities and experience social, emotional and behavioral problems in the classroom—are frequently headed toward or are already experiencing these difficult situations when they and/or their parents come to us for legal assistance.

In our experience, these outcomes can often be averted for children with disabilities when key provisions of the IDEA are implemented as intended. Through our representation of these families, we are often able to correct the IDEA implementation failures that are contributing to poor outcomes. When schools start to implement the law as intended, we have seen critical turnarounds for students. Our hope is that by linking poor outcomes to IDEA implementation failures—and then suggesting reforms that could improve implementation—we can help more students experience success without the need for legal representation. The provision of necessary special education supports and services can help students become stable and ultimately successful and avoid the adverse outcomes for which statistics indicate they are at increased risk.

Our effort in this Part is first to put a human face on each of these poor outcomes by sharing the story of an actual student with whom we have worked, and second to review some social scientific studies that demonstrate the commonality of this student's experience.

### **A. Low Achievement**

The low level of achievement—both in school and beyond—frequently experienced by youth with social, emotional and behavioral challenges is illustrated vividly in the story of “Marcus,” an eighteen-year-old young man who had all but dropped out of high school when his therapist referred him for legal advocacy in special education. Marcus had been diagnosed with depression and anxiety, and his mental health providers were monitoring him closely because they were concerned that he might also have a thought disorder such as schizophrenia. He had been found eligible for an IEP back in elementary school; however, he had never been provided with appropriate services and had been retained twice. As a result, Marcus

became a high school junior who could not read. His shame about his illiteracy contributed significantly to his feeling of disengagement from school. His fluctuating emotional state meant that on some days he would be motivated to turn things around; on others he just wanted to give up. Even though his access to legal services might have helped him secure an education that could teach him to read, he was not able to hang in long enough to realize this goal. He left school without the ability even to read a simple restaurant menu. He also had not been taught the skills that would enable him to manage his mental illness so that he could hold down a job or live on his own.

Research has documented that a reciprocal relationship exists between social, emotional and behavioral challenges and poor academic achievement: both factors can mutually reinforce each other in a downward spiral for students such as Marcus.<sup>32</sup> According to one study, 83% of students with emotional/behavioral disorders scored below the mean of the norm group—students without such disorders—across all academic areas on a standardized achievement test.<sup>33</sup> Lower achievement for these students did not improve over time in reading and writing and actually got worse over time in mathematics.<sup>34</sup> A comprehensive national study followed students with a serious emotional or behavioral disturbance for seven years and found that their academic problems increased over time: at the beginning of the study 58% were below grade level in reading and 93% were below grade level in math; at the end, these figures increased to 75.4% and 96.9%, respectively.<sup>35</sup> Of those who were still attending high school at the conclusion of the study, over half (53.6%)

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32. See PREVENTING MENTAL, EMOTIONAL, AND BEHAVIORAL DISORDERS AMONG YOUNG PEOPLE: PROGRESS AND POSSIBILITIES 107 (Mary Ellen O'Connell et al. eds. 2009) [hereinafter PREVENTING MENTAL, EMOTIONAL, AND BEHAVIORAL DISORDERS] (citing JOY DRYFOOS, ADOLESCENTS AT RISK: PREVALENCE AND PREVENTION (1990)); Howard Adelman & Linda Taylor, *Moving Prevention from the Fringes into the Fabric of School Improvement*, 11 J. EDUC. PSYCH. CONSULTATION 7 (2000)).

33. See J. Ron Nelson et al., *Academic Achievement of K-12 Students with Emotional and Behavioral Disorders*, 71 EXCEPTIONAL CHILD. 59, 65 (2004).

34. See *id.* at 69.

35. See Paul E. Greenbaum et al., *National Child and Adolescent Treatment Study (NACTS): Outcomes for Children with Serious Emotional and Behavioral Disturbance*, 4 J. EMOTIONAL & BEHAV. DISORDERS 130, 134, 143 (1996). The 75.4% and 96.9% figures were for students who were 18 or older at the conclusion of the study; rates were similarly high for students under 18 who remained in school—85.1% below grade level in reading and 94.3% below grade level in math. See *id.* at 143. Students' reading and math levels were measured using the Wide Range Achievement Test (WRAT), a common standardized measure of academic achievement. See *id.* at 132.

were in classrooms below their chronological age level—meaning that they had failed at least one grade.<sup>36</sup> These poor academic outcomes in secondary school can be traced to emotional and behavioral challenges at much earlier ages. For example, depressive symptoms and both aggressive and withdrawn behaviors in early elementary school have been linked to later problems with concentration, attention and poor achievement.<sup>37</sup>

This lower achievement is not confined to academic areas. Students with social, emotional and behavioral disabilities have been found to struggle generally with the transition to adulthood even more than students with learning or intellectual disabilities.<sup>38</sup> One reason for this greater vulnerability is that they tend to lack appropriate social skills.<sup>39</sup> They also often have decreased skills in a number of other areas that are necessary for success as an adult: self-awareness and responsibility, vocational skills, daily functional skills, and the ability to identify and access appropriate school and community services.<sup>40</sup> Together, all of these factors combine with lower school success to result in students with social, emotional and behavioral challenges being underrepresented in a host of positive post-school outcomes.<sup>41</sup> For example, one study found that among

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36. See *id.* at 132; see also Mary Wagner et al., *The Children and Youth We Serve: A National Picture of the Characteristics of Students with Emotional Disturbances Receiving Special Education*, 13 J. EMOTIONAL & BEHAV. DISORDERS 79, 88–89 (2005) (finding that 22% of elementary and middle school students with emotional disturbances and 37.7% of secondary school students with emotional disturbances had been retained in grade at least once).

37. See PREVENTING MENTAL, EMOTIONAL, AND BEHAVIORAL DISORDERS, *supra* note 32, at 180 (citing Sheppard G. Kellam et al., *Paths Leading to Teenage Psychiatric Symptoms and Substance Use: Developmental Epidemiological Studies in Woodlawn*, in CHILDHOOD PSYCHOPATHOLOGY AND DEVELOPMENT 17–51, (Samuel B. Guze et al. eds., 1983); Sheppard G. Kellam et al., *Developmental Epidemiologically Based Preventive Trials: Baseline Modeling of Early Target Behaviors and Depressive Symptoms*, 19 AM. J. CMTY. PSYCH. 563 (1991)).

38. See Alan R. Frank et al., *Young Adults with Behavioral Disorders: A Comparison with Peers with Mild Disabilities*, 3 J. EMOTIONAL BEHAV. DISORDERS 156, 157 (1995). As stated *supra* note 4, the students with whom we work often have both an emotional or behavioral disorder and one or more other disabilities.

39. See John W. Maag & Antonis Katsiyannis, *Challenges Facing Successful Transition for Youths with E/BD*, 23 BEHAV. DISORDERS 209, 215 (1998) (“[T]here is probably no one area of dysfunction that so uniformly describes youth with E/BD as lack of social competence.”).

40. See *id.* at 213 (citing DAVID F. BATEMAN, A SURVEY OF TRANSITION NEEDS OF STUDENTS WITH BEHAVIOR DISORDERS IN THE MIDWEST (1996)).

41. See Greenbaum et al., *supra* note 35, at 144 (noting the “constellation of problems in multiple domains, including emotional and behavioral functioning, high prevalence of diagnosable disorders with frequent co-occurrence of disorders, and

young adults with serious emotional disturbance, less than half (47.4%) were competitively employed when they had been out of high school for 3 to 5 years, only a quarter (25.6%) were attending postsecondary schooling, and only two-fifths (40.2%) were able to live independently.<sup>42</sup>

As Marcus's story illustrates, this lack of achievement both in school and in the early years of young adulthood is often associated with a failure to identify students for appropriate special education services early. This problem greatly increases the risk that appropriate services will be less effective if offered at a later time. One study found that a student with serious emotional disturbance who is offered services for the first time at age 8 has a 24% chance of an unsuccessful outcome; this increases to 43% for a student who is first offered services four years later, at age 12.<sup>43</sup> Others have documented schools' tendency to delay the provision of special education services that address social, emotional and behavioral issues, and the experience of Marcus and other students with whom we have worked confirms this tendency, as well as the likelihood of poor outcomes that it portends.<sup>44</sup>

### B. Suspensions and Expulsions

"Tabitha" struggled with depression and an anxiety disorder. She had trouble relating to other children, as well as to her teachers, and felt sad and lonely almost all of the time. Although these characteristics—and their resulting negative impact on her school achievement—would have qualified her under special education regulations as a child with emotional disturbance,<sup>45</sup> Tabitha's school

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sizable deficiencies in social and adaptive behavior as well as academic skills" that characterize students with emotional and behavioral disorders).

42. See Jose Blackorby & Mary Wagner, *Longitudinal Postschool Outcomes of Youth with Disabilities: Findings from the National Longitudinal Transition Study*, 62 EXCEPTIONAL CHILD 399, 404, 407–08 (1996).

43. See Richard E. Mattison et al., *Enrollment Predictors of the Special Education Outcome for Students with SED*, 23 BEHAV. DISORDERS 243, 253 (1998). Increasing age at enrollment was the biggest predictor of unsuccessful outcomes, which the study defined as dropping out of school or poor postgraduate outcomes. See *id.*

44. See Brent B. Duncan et al., *Students Identified as Seriously Emotionally Disturbed in School-Based Day Treatment: Cognitive, Psychiatric and Special Education Characteristics*, 20(4) BEHAV. DISORDERS 238, 249 (1995).

45. 34 C.F.R. § 300.8(c)(4)(i) (indicating that a child qualifies for special education as a student with "emotional disturbance" if he or she exhibits one or more enumerated characteristics "over a long period of time and to a marked degree," which adversely affects his or her educational performance, such as an inability to

did not identify her as eligible under the law. Instead, when Tabitha argued with her peers and teachers, she was repeatedly suspended, spending most of the first semester of her seventh grade year out of school. Finally, Tabitha's school decided her insubordination was too disruptive and the principal threatened to expel her and call the police the next time she talked back to a teacher. Tabitha was about to get kicked out of the seventh grade for behavior she had a very difficult time controlling.

Suspensions and expulsions are experienced at high rates by students with disabilities disproportionate to their representation in the general population.<sup>46</sup> Regardless of a student's particular disability, suspensions and expulsions by definition often indicate the presence of social, emotional and behavioral challenges. However, students identified with an emotional disability are at particularly high risk for such punitive school discipline measures. A national study found that 47.7% of elementary and middle school students with emotional disabilities and 72.9% of secondary school students with emotional disabilities report having been suspended or expelled from school.<sup>47</sup> The presence of mental health problems in children leads more broadly to absenteeism, suspension, and expulsion at rates higher than for children with other disabilities.<sup>48</sup>

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build or maintain satisfactory interpersonal relationships with peers and teachers and a general pervasive mood of unhappiness or depression).

46. See DANIEL J. LOSEN & TIA ELENA MARTINEZ, CENTER FOR CIVIL RIGHTS REMEDIES, *OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS* 3, 10–11 (2013), *available at* [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack\\_UCLA\\_4-8.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf) (finding that one in five secondary school students with disabilities was suspended (19.3%), nearly triple the rate of all students without disabilities (6.6%), based on an analysis of national data from the U.S. Department of Education's Office of Civil Rights from 6835 school districts, which covered approximately 85% of all students attending U.S. public schools, in the 2009–2010 school year); see also RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* 62–63 (2006), *available at* <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> (discussing a number of studies based on national and state samples, most of which indicate that students with a disability represent a larger proportion of the suspended/expelled population than expected based on their proportion in the school population, and are overrepresented when compared to students not receiving special education services).

47. Wagner et al., *supra* note 36, at 88.

48. SHANNON STAGMAN & JANICE L. COOPER, CHILDREN'S MENTAL HEALTH: WHAT EVERY POLICYMAKER SHOULD KNOW 4 (2010), [http://www.nccp.org/publications/pdf/text\\_929.pdf](http://www.nccp.org/publications/pdf/text_929.pdf).

Zero tolerance policies, which are school discipline policies that mandate severe punishment for students regardless of the circumstances,<sup>49</sup> often leave children with no opportunity to explain any mitigating circumstances.<sup>50</sup> These policies also contribute to the high suspension and expulsion rates for students with social, emotional, and behavioral challenges. This phenomenon is especially problematic for children with unidentified emotional or mental health disorders.<sup>51</sup> With the rise of zero tolerance policies, schools disproportionately expel students with disabilities and increasingly criminalize misbehavior in school.<sup>52</sup>

These policies contribute to the “school-to-prison pipeline,” in which students are pushed out of classrooms and into the juvenile and criminal justice systems.<sup>53</sup> Students with disabilities are at particularly high risk for entry into the school-to-prison pipeline.<sup>54</sup> Rather than

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49. Daniel J. Losen & Johanna Wald, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Autumn 2003, at 9, 11, available at [http://media.wiley.com/product\\_data/excerpt/74/07879722/0787972274.pdf](http://media.wiley.com/product_data/excerpt/74/07879722/0787972274.pdf).

50. Kristy A. Mount, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 108 (2002).

51. See *id.* at 109.

52. Joseph B. Tulman, *Special Education Advocacy for Youth in the Delinquency System*, in SPECIAL EDUCATION ADVOCACY 401, 405 (Ruth Colker & Julie Waterstone eds., 2011); see also THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 8–9 (2000), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>.

53. Losen & Wald, *supra* note 49, at 11 (describing the school-to-prison pipeline). See generally CATHERINE Y. KIM ET AL., THE SCHOOL TO PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010).

54. *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 112th Cong., 2 (2012) (statement of Melodee Hanes, Acting Administrator Office of Juvenile Justice and Delinquency Prevention Office of Justice Programs), available at <http://www.judiciary.senate.gov/pdf/12-12-12HanesTestimony.pdf> (describing the high discipline rates among students with disabilities and that suspension or expulsion of a student for a discretionary violation nearly tripled the likelihood of juvenile justice contact within the subsequent academic year). In addition to students with disabilities, students of color are also overrepresented in the school-to-prison pipeline, through high suspension and expulsion rates that are linked to higher likelihood of contact with the juvenile justice system. An analysis of federal data shows that certain groups of students who have disabilities and who are also students of color are at especially high risk. See DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 7, 34–35 (2012), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf>



implementing behavior management programs for children with disabilities or emotional disturbances, school officials often call the police instead, which may result in the filing of delinquency petitions.<sup>55</sup> Even when children are not directly referred to the delinquency system for behavior in school, those who are suspended or expelled are at greater risk of becoming involved in delinquent conduct because they often do not receive the education to which they are entitled during periods of suspension or expulsion.<sup>56</sup> Overall, students with mental health disorders are less likely to succeed if they have been subjected to suspension or expulsion.<sup>57</sup>

### C. School Dropout

Seventeen-year-old “Jim” was diagnosed with Post-Traumatic Stress Disorder (PTSD) after he suffered gunshot wounds and developed paraplegia, which made him dependent on a wheelchair for his mobility. Although he had a special education program in place at his school, his program lacked counseling services to help him cope with the educational impacts of his PTSD.<sup>58</sup> Moreover, Jim was not provided with many of the accommodations he needed due to his wheelchair, such as access to the school elevator, more time between class periods to get through the crowded school hallways, and a locker low enough for him to reach. His mother was concerned about his poor grades and his social isolation, but the school always scheduled her son’s special education meetings at a time when she could not

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(finding through an analysis of national U.S. Department of Education data that more than 13% of students with disabilities were suspended, at approximately twice the rate of their non-disabled peers, with 25% of African-American children with disabilities enrolled in grades K–12 suspended at least once in 2009–2010, and describing studies that link high suspension rates with higher likelihood of contact with the juvenile justice system).

55. Tulman, *supra* note 29, at 38.

56. *See id.* at 37.

57. BAZELON CTR. FOR MENTAL HEALTH LAW, SUSPENDING DISBELIEF: MOVING BEYOND PUNISHMENT TO PROMOTE EFFECTIVE INTERVENTIONS FOR CHILDREN WITH MENTAL OR EMOTIONAL DISORDERS 6 (2003), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=mdLYu8-RGuU%3D&tabid=104>.

58. For a discussion of PTSD in children, related diagnoses and symptoms, and their effects on children’s learning, see SUSAN F. COLE ET AL., MASS. ADVOCATES FOR CHILDREN, HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE 93–96 (2005), *available at* <http://traumasensitiveschools.org/tlpi-publications/download-a-free-copy-of-helping-traumatized-children-learn>; *see also Post-Traumatic Stress Disorder*, NAT’L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> (last visited Sept. 22, 2013) (summarizing the educational impacts of exposure to traumatic experiences).

take off work. Without that critical opportunity to communicate, most of her son's teachers remained unaware of her concerns. Lacking appropriate special education services and accommodations to address his varying needs, Jim found school to be an overwhelming and unfriendly place. Frustrated by his academic failures, his difficulty navigating his largely inaccessible school in a wheelchair and his feeling of being alone in the classroom without any friends, Jim stopped going to school, and eventually dropped out.

School dropout is common for students with social, emotional and behavioral challenges such as Jim, with the latest data from the U.S. Department of Education indicating dropout rates of 44.9% for students with emotional disturbance, compared to 26.2% of all students with disabilities.<sup>59</sup> Children experiencing psychiatric disorders specifically related to traumatic events are especially at increased risk of dropping out.<sup>60</sup> Students with multiple disabilities, a special education category for which Jim likely qualified due to his concurrent physical and emotional disabilities, also graduate with a high school diploma at lower rates than all students with disabilities.<sup>61</sup>

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59. U.S. DEP'T OF EDUC., 30TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 67 (2008), *available at* <http://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf>; *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-773, SPECIAL EDUCATION: FEDERAL ACTIONS CAN ASSIST STATES IN IMPROVING POSTSECONDARY OUTCOMES FOR YOUTH, *available at* <http://www.gao.gov/new.items/d03773.pdf> (indicating that 53% of students with emotional disturbance fail to finish high school, compared to 29% of all students with disabilities); *see also* BAZELON CTR. FOR MENTAL HEALTH LAW, HOW CHILDREN WITH SERIOUS MENTAL HEALTH PROBLEMS ARE TREATED IN OUR SCHOOLS—AND HOW TO FIX IT 2 (2011), <http://bazelon.org/LinkClick.aspx?fileticket=N7Q53i3SdBo%3d&tabid=134> (noting that 44% of children with emotional disturbance drop out before graduation, compared to 10% of the total student population).

60. Youth who experience early traumatic stress, chronic stress, or psychiatric disorders have increased school dropout rates. Many of these children develop behavior problems and qualify for disability diagnoses, such as psychiatric disorders or information processing disorders, which make them eligible to receive services under the IDEA. In one study, researchers examined the correlation between school dropout rates and childhood traumatic stress, childhood psychiatric disorders, and childhood utilization of mental health services. The dropout rate for youths with a childhood onset psychiatric diagnosis from the DSM-IV was higher than the dropout rate for youths without a childhood onset psychiatric diagnosis (19.75% versus 13.60%). The study explains that children who externalize early trauma through self-destructive behaviors, conduct problems, or substance abuse tend to exhibit disruptive classroom behaviors, and educators may interpret behaviors of youths with psychiatric conditions as indications of not caring about school or as disruptive conduct warranting punitive rather than therapeutic responses. Michelle V. Porche et al., *Childhood Trauma and Psychiatric Disorders as Correlates of School Dropout in a National Sample of Young Adults*, 82 CHILD DEV. 982, 983, 987, 989 (2011).

61. U.S. DEP'T OF EDUC., *supra* note 59.

Dropout rates are high for these young people for many reasons. For example, the frustration that accompanies low achievement in school,<sup>62</sup> especially for a student who is lacking critical special education supports and services, can lead to school dropout. Moreover, students with mental health problems miss on average between 18 to 22 days of school in an academic year, and this missed instruction can also contribute to school dropout.<sup>63</sup> Some of these children miss a high number of school days due to suspensions and expulsions, losing valuable educational time, falling further behind, and facing a higher likelihood of retention, all of which can eventually lead to school dropout.<sup>64</sup> Once children with disabilities drop out of school, they are more likely to become involved in the criminal justice system, as 73% of youth with serious emotional disorders are arrested within five years of dropping out of school<sup>65</sup> and 35% are arrested within two years of dropping out.<sup>66</sup>

#### D. Involvement in the Juvenile Justice System

At age thirteen, “Diego” attended an overcrowded middle school. His pre-school had previously recognized his developmental delays, and the specialists to whom his pediatrician referred him confirmed his cognitive disabilities, but he had never received any special education services in school. Already angry as a result of feeling confused in his classes and the frequent bullying he endured, Diego lost his temper when a classmate teased him for being stupid and the two students got into a fight. Diego’s teacher called the police and he was handcuffed and arrested in school in front of his classmates, which was a traumatizing and shaming experience for him. Diego was sent to the juvenile detention center, where he was further bullied, did not understand the court process his public defender explained to him, and spent long days in a cell, without educational or mental health services to help him learn or cope with his fear, confusion, and anxiety.

Along with a higher likelihood of dropping out of school and of facing suspensions and expulsions, children with disabilities such as Diego are also overrepresented in the juvenile justice system at all

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62. See discussion *supra* Part I.A.

63. See STAGMAN & COOPER, *supra* note 48.

64. See BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 59.

65. Lili Garfinkle, *Youth with Disabilities in the Justice System: Integrating Disability Specific Approaches*, 11 FOCAL POINT 21, 21 (1997), available at <http://www.pathwaysrtc.pdx.edu/pdf/fpS97.pdf>; see *infra* Part I.D.

66. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 6.

stages—in juvenile court and in juvenile shelter care, detention, and incarceration facilities.<sup>67</sup> Even compared to other students with disabilities, those students identified as seriously emotionally disturbed are 13.3 times more likely to be arrested while in school and 16.9 times more likely to be arrested after leaving school.<sup>68</sup> In one study of youths between 9 and 17 years old with serious emotional disturbances, approximately two thirds (66.5%) had at least one contact with police in which the child was believed to be the perpetrator of a crime, 43.3% were arrested at least once, 49.3% were required to appear before a court or judge (these appearances included arrests and other court appearances), and 34.4% were adjudicated delinquent or convicted of a crime.<sup>69</sup>

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67. Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876, 882 (2010). Although this Part discusses the involvement of youth with disabilities in the juvenile justice system, youth of color, who also comprise the majority of students on behalf of whom we advocate, are more likely to be arrested than their white counterparts. For example, African American youth are overrepresented at every stage of the juvenile justice process, such as arrest, detention, adjudication of delinquency probation, placement in a juvenile detention facility, and transfer to adult prison. See ELEANOR HINTON HOYTT, ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 16–19 (2001), available at <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf>; ANNIE E. CASEY FOUND., DETENTION REFORM: AN EFFECTIVE APPROACH TO REDUCE RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE 2–3 (2009), available at [http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/DetentionReformAnEffectiveApproachToReduceRac/JDAI\\_factsheet\\_3.pdf](http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/DetentionReformAnEffectiveApproachToReduceRac/JDAI_factsheet_3.pdf) (indicating that youth of color are more likely to be detained and more likely to face harsher consequences in the juvenile justice system). The U.S. Department of Justice reported that while African American youth ages 10–17 comprised 16% of the population that age in 2003, they made up 27% of juveniles arrested. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 125 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. While the federal government does not separately disaggregate Latino youth arrest rates, some states do collect such data, reflecting a disproportionate rate of Latino youth arrests compared with the population percentage of Latinos. For example, in California, Latino youth ages 10–17 made up 46% of youth that age in 2007, but 51% of total youth arrests. NEELUM ARYA ET AL., AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE 30 (2009), available at [http://www.campaignforyouthjustice.org/documents/Latino\\_Brief.pdf](http://www.campaignforyouthjustice.org/documents/Latino_Brief.pdf). Latino and Native American youth are between two and three times and African-American youth are nearly five times more likely to be confined than their white peers. ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013), available at <http://www.aecf.org/KnowledgeCenter/~media/Pubs/Initiatives/KIDS%20COUNT/R/ReducingYouthIncarcerationSnapshot/DataSnapshotYouthIncarceration.pdf>.

68. Bonnie Doren et al., *Predicting the Arrest Status of Adolescents with Disabilities in Transition*, 29 J. SPECIAL EDUC. 363, 370–74 (1996).

69. Greenbaum et al., *supra* note 35, at 140–41.

Not surprisingly, arrest often leads to spending time in jail or juvenile corrections facilities; one study showed that 60% of male detainees and at least two-thirds of female detainees are diagnosed with a psychiatric disorder.<sup>70</sup> In a study that examined youth across multiple juvenile justice settings, 70.4% were diagnosed with at least one mental health disorder, and 79.1% of those youth also met criteria for at least one additional mental health diagnosis.<sup>71</sup> When detained or incarcerated, children with social, emotional and behavioral challenges are removed from their communities, schools, and homes, to their detriment.<sup>72</sup> It is estimated that youth with emotional disabilities are at least three to five times more prevalent in juvenile correctional facilities than in public schools.<sup>73</sup> When schools themselves refer students to the juvenile justice system, they frequently fail to identify those who have disabilities and also fail to transfer special education evaluations and other important documents to the juvenile justice system personnel.<sup>74</sup> As a result, the numbers of children with disabilities or those with special education needs in the juvenile justice system are likely underreported.<sup>75</sup>

#### **E. Psychiatric Hospitalization and Institutionalization in Residential Treatment Centers**

Nine-year-old “Katrina” struggled with significant learning disabilities and a mood disorder. While her school had developed a special education plan for her, educators often responded to her troubling behaviors with punishment, rather than positive behavioral interventions, as contemplated by special education law.<sup>76</sup> Her special education program lacked a behavioral intervention plan<sup>77</sup> and the individual and group counseling services she was supposed to receive as part of that program were provided only sporadically. When she was overwhelmed, she curled up on the floor, cried, screamed, and hit herself on the head with balled fists. As she continued to go without

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70. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1137 (2002).

71. KATHLEEN R. SKOWYRA & JOSEPH J. COCOZZA, NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM 3 (2007).

72. Tulman & Weck, *supra* note 67, at 876–77.

73. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 6.

74. Tulman, *supra* note 52, at 405.

75. *Id.*

76. *See infra* Part II.D.

77. *See infra* Part II.D.

the services she needed or a coordinated, positive approach to her behavioral challenges in school, her meltdowns became more frequent. One day, unsure how to respond to her escalating behavior, her teacher called the police and asked that she be transported to the hospital for psychiatric treatment. Katrina was admitted to the hospital without her mother's consent, and the doctors recommended that she be sent to a long-term psychiatric residential treatment facility funded by Medicaid.

As with Katrina, children with disabilities who have social, emotional, and behavioral problems in school can experience both acute psychiatric hospitalization and longer-term institutionalization in residential treatment centers.<sup>78</sup> Involuntary psychiatric hospitalization is typically reserved for children with significant mental health needs, such as those who are found to be a danger to themselves or others<sup>79</sup>—and is therefore never an outcome any family

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78. Ellen A. Callegary, *The IDEA's Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garret F.*, 5 J. HEALTH CARE L. & POL'Y 164, 166 (2002). Children from poor families are also more likely to end up in psychiatric treatment or residential treatment centers. Christine F. Vaughn, *Residential Treatment Centers: Not a Solution for Children with Mental Health Needs*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 274, 274 (2005). Moreover, there are high rates of African American children in residential treatment centers for emotionally disturbed youth. U.S. PUB. HEALTH SERV., DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY 65 (2001), available at <http://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/TOC.pdf>.

79. Children may be committed for psychiatric treatment without their consent pursuant to state civil commitment statutes, provided that standards such as "dangerousness to self or others" are met. See, e.g., MASS. ANN. LAWS ch. 123 §§ 1, 8(a) (LexisNexis 2003) (indicating that following a hearing, the court may commit a person to a mental health facility based on a finding that "(1) such person is mentally ill, and (2) the discharge of such person from a facility would create a likelihood of serious harm" and defining likelihood of serious harm as "(1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."). Civil commitment of children requires some constitutional protections under the Due Process Clause of the Fourteenth Amendment. See *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional '[f]reedom from bodily restraint' is no narrower than an adult's." (alteration in original)); *Parham v. J.R.*, 442 U.S. 584, 585 (1979) (noting that a child retains a constitutional liberty interest through the Due Process Clause of the Fourteenth Amendment to be free from unwarranted and ineffective treatments). The *Parham* Court noted that "a

would want for its child. Residential treatment centers are long-term placements for children with emotional disturbance, and are often costly,<sup>80</sup> restrictive, institutional settings,<sup>81</sup> where children may be far from their families.<sup>82</sup> Residential treatment centers may deprive youth of important connections and developmental opportunities<sup>83</sup> and put them at high risk of abuse and neglect in those facilities.<sup>84</sup>

Children with disabilities who experience social, emotional, and behavioral challenges at school may end up in one of these long-term residential treatment centers or in psychiatric hospitalization,<sup>85</sup> some unnecessarily.<sup>86</sup> Many require this level of treatment because their needs were not adequately addressed earlier on by their schools<sup>87</sup> and other community-based providers.<sup>88</sup> With the necessary supports and services in place in school, psychiatric hospitalization and

child has a protectable interest . . . in being free from unnecessary bodily restraints,” but it declined to provide extensive due process protections to children committed by their parents to state mental institutions, providing that parental autonomy allows parents to commit a child without the child’s consent. *Parham*, 442 U.S. at 585, 601. The Court determined that a doctor’s conclusion regarding the need for treatment would protect a child from the “risk of error inherent in the parental decision to have a child institutionalized for mental health care.” *Id.* at 606–608; *see also* Charles Zorumski & Eugene Rubin, *Can the Mentally Ill Be Hospitalized Against Their Will?*, PSYCHOL. TODAY (Oct. 28, 2010), <http://www.psychologytoday.com/blog/demystifying-psychiatry/201010/can-the-mentally-ill-be-hospitalized-against-their-will>.

80. *See* UNIV. LEGAL SERVS., INC., OUT OF STATE, OUT OF MIND: THE HIDDEN LIVES OF D.C. YOUTH IN RESIDENTIAL TREATMENT CENTERS 3, 10 (2009), *available at* <http://www.uls-dc.org/out-2520of-2520state-2520out-2520of-2520mind-2520revision-2520final.pdf>.

81. *See* Bernard P. Perlmutter & Carolyn S. Salisbury, *Please Let Me Be Heard: the Right of A Florida Foster Child to Due Process Prior to Being Committed to A Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725, 735 (2001).

82. *See* UNIV. LEGAL SERVS., INC., *supra* note 80, at 5.

83. *See* Vaughn, *supra* note 78.

84. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-146T, RESIDENTIAL TREATMENT PROGRAMS: CONCERNS REGARDING ABUSE AND DEATH IN CERTAIN PROGRAMS FOR TROUBLED YOUTH 12 (2007), <http://www.gao.gov/assets/120/118038.pdf>.

85. CHILD. SERVS. TASK FORCE, MAGELLAN HEALTH SERVS., PERSPECTIVES ON RESIDENTIAL AND COMMUNITY-BASED TREATMENT FOR YOUTH AND FAMILIES 5 (2008), *available at* [http://www.magellanhealth.com/media/2718/CommunityResidentailTreatment\\_White\\_Paper.pdf](http://www.magellanhealth.com/media/2718/CommunityResidentailTreatment_White_Paper.pdf); *see also* Vaughn, *supra* note 78.

86. UNIV. LEGAL SERVS., INC., *supra* note 80.

87. Yael Cannon, *There’s No Place Like Home: Realizing the Vision of Community-Based Mental Health Treatment for Children*, 61 DE PAUL L. REV. 1049, 1071 (2012).

88. *Fact Sheet: Children in Residential Treatment Centers*, BAZELON CTR. FOR MENTAL HEALTH L. 2, [http://bazelon.org/LinkClick.aspx?fileticket=D5NL7igV\\_CA%3D&tabid=247](http://bazelon.org/LinkClick.aspx?fileticket=D5NL7igV_CA%3D&tabid=247) (last visited Dec. 18, 2013) (citing U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General*, (1999)).

institutionalization in a longer-term facility can be avoided for many children.<sup>89</sup>

As described above, both the studies and our experiences indicate that students with disabilities, and particularly those with emotional disabilities, are more likely to face a number of the poor outcomes described above. Similarly, students we encounter who are not receiving necessary special education services are at high risk for such outcomes, as they struggle to thrive academically and emotionally. However, special education law provides tools that can help to prevent such poor outcomes, or divert students who are moving in those directions. The IDEA and its accompanying regulations include provisions that, when implemented effectively, can help to provide stability and promote social, emotional, and behavioral growth, as well as broader educational and life success. We have seen many students who were headed toward poor outcomes, but were able to avoid them when they began to receive the necessary special education supports and services.

## II. MAPPING IMPLEMENTATION FAILURES OF IDEA'S KEY PROVISIONS

Fortunately, special education law provides mechanisms for preventing students with social, emotional and behavioral challenges from experiencing the negative outcomes described above. The IDEA's legislative findings evidence Congress' concern that these outcomes are all too common for students with disabilities.<sup>90</sup> For example, these findings state that "greater efforts are needed to prevent the intensification of problems connected with...high dropout rates among minority children with disabilities."<sup>91</sup> Furthermore, Congress explicitly recognized multiple reasons why the educational needs of children with disabilities have historically not been fully met. For example, children have been excluded from the public school system and educated separately from their nondisabled peers; undiagnosed disabilities have prevented children from having a successful educational experience; and a lack of adequate resources within the public school system has forced families to seek services outside of that system.<sup>92</sup> Congress expressed concern that implementation of the IDEA has been hindered by low expectations

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89. UNIV. LEGAL SERVS., INC., *supra* note 80, at 19; *see also* Vaughn, *supra* note 78.

90. 20 U.S.C. § 1400 (2012).

91. § 1400(c)(12)(A).

92. § 1400(c)(2)(B)–(D).



and an inadequate focus on the application of proven teaching and learning methods for children with disabilities.<sup>93</sup>

In crafting the IDEA to address some of these systemic shortcomings and in hope of ensuring better outcomes and meaningful success for students with disabilities, Congress emphasized that the education of children with disabilities can be “made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to . . . be prepared to lead productive and independent adult lives.”<sup>94</sup> To that end, the Supreme Court has clarified that Congress intended for schools to keep students with disabilities in the classroom.<sup>95</sup> In particular, the Supreme Court has placed limits on the practice of unilaterally excluding students with special needs from the classroom, especially in response to disability-related behaviors.<sup>96</sup>

To remedy Congress’ concerns, the IDEA provides for mechanisms to prevent the troubling outcomes that many children with social, emotional and behavioral challenges experience. In this Part, we describe those key provisions of the IDEA that represent the potential for special education to serve as a tool for ensuring better outcomes for these students—when the spirit and letter of these provisions are implemented as intended. We also discuss the implementation failures that we most commonly see, with stories of our client families to illustrate the resulting poor outcomes for students with social, emotional and behavioral difficulties.<sup>97</sup>

### A. Child Find and Evaluation

The law places an affirmative obligation on states and schools to identify, locate, and evaluate all children with disabilities in the state who require special education, an obligation known as “Child Find.” Child Find is the first step in ensuring that the entire IDEA and the

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93. § 1400(c)(4).

94. § 1400(c)(5)(A).

95. *Honig v. Doe*, 484 U.S. 305, 323 (1988).

96. *See id.* (“Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students.”).

97. In addition to our descriptions and stories of implementation failures reflecting a consistency of concerns in the four different regions in which we have practiced—California, the District of Columbia, Massachusetts, and New Mexico—we have also spoken informally and through a discussion we facilitated at a symposium at Pepperdine School of Law with special education attorneys and clinical law professors from across the country, whose anecdotal experiences reflect similar implementation failures and concerns.

ultimate vision of Congress are carried out.<sup>98</sup> The IDEA does not limit this obligation to situations in which a parent has informed the school that the child has a disability or requested services. Instead, in placing the Child Find responsibility with school officials, Congress emphasized that undiagnosed disabilities have prevented children from having a successful educational experience<sup>99</sup> and recognized that educators are uniquely trained and armed with the tools to identify when a child is failing to make effective educational progress, whether academically, developmentally, socially, or behaviorally.

Child Find requires teachers and administrators to keep a watchful eye on students and gather data when a student presents signs of struggle or difficulties in either academic or social/emotional domains. In including the robust Child Find provision in the IDEA, Congress recognized the importance of early interventions<sup>100</sup> for children with disabilities and codified its hope that early services would reduce the chances that a child will need special education services at a later age.<sup>101</sup>

The IDEA also includes specific requirements for evaluations. Many of these requirements are designed to ensure that students with disabilities are assessed thoroughly and effectively. Although the legislative history of these provisions does not provide much background on Congress's intentions,<sup>102</sup> courts have held school districts accountable for failing to evaluate students comprehensively,

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98. See § 1400(d)(1)(A). In enacting the IDEA, Congress aimed to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique need and prepare them for further education, employment, and independent living." *Id.* Implementation by states and schools of Child Find is the necessary first step that the IDEA prescribes towards the realization of this vision.

99. See § 1400(c)(2)(C).

100. In addition to the special education provisions we highlight in this Article, which come from Part B of the IDEA, covering students ages three to twenty-two, Congress provided for even earlier services for children with developmental delays ages zero to three, known as early intervention services, codified in IDEA's Part C. *Id.* § 1431; see Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 156–57 (2000) (emphasizing the preventive focus of early intervention services for infants and toddlers under the IDEA); Jennifer N. Rosen Valverde, *Early Intervention Services*, in SPECIAL EDUCATION ADVOCACY, *supra* note 52, at 195 (providing an overview of the IDEA's early intervention services program).

101. See S. REP. NO. 108-185, at 49, 50 (2003).

102. See H.R. REP. NO. 105-95, at 98 (1997); S. REP. NO. 105-17, at 18 (1997) (both indicating the additional requirements that Congress added to the evaluation process, such as the requirement that students be assessed in all areas of suspected disability, but without discussing why these provisions were added beyond the intention to reflect current policy, law, and regulations).

as required by the IDEA.<sup>103</sup> Scholars also have emphasized the critical value of thorough assessments for students with disabilities.<sup>104</sup> Furthermore, Congress has expressed particular concern about the mislabeling of students with limited English proficiency and of minority students, for whom effective evaluations are therefore especially critical.<sup>105</sup>

The importance of the evaluation requirements is evident in the recourse that the IDEA and the U.S. Department of Education regulations have provided to parents who disagree with the school district's evaluation.<sup>106</sup> In fact, parents who disagree with a school's evaluation can receive a private, independent evaluation *at public expense*.<sup>107</sup> If a parent requests an independent evaluation, the school district must either file a due process complaint to show that its initial evaluation is appropriate, or provide the funding for an independent evaluation.<sup>108</sup> The availability of this remedy to parents underscores

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103. See e.g., *K.I. v. Montgomery Pub. Sch.*, 805 F. Supp. 2d 1283 (M.D. Ala. 2011) (finding that by failing to provide cognitive and assistive technology assessments to address all areas of student's disabilities, the school was unable to design suitable goals or develop an adequate IEP and ordering the school district to reevaluate the student); *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 556 (E.D. Pa. 2007) (concluding that failure to evaluate student's behavioral difficulties led to failure to provide necessary services); see also Mark C. Weber, *All Areas of Suspected Disability*, 59 LOY. L. REV. 289, 301–304 (2013) (reviewing case law applying the IDEA requirement that students must be evaluated in all areas of suspected disability).

104. See Elisa Hyman et al., *supra* note 28, at 115; Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law and What Might Have Been*, 41 J.L. EDUC. 71, 79 (2012); Weber, *supra* note 103, at 296.

105. 20 U.S.C. § 1400(c)(10)–(13) (2012).

106. *Id.* § 1415(b)(1), (d)(2)(A); 34 C.F.R. § 300.502(b) (2013). Note that the right to a *publicly funded* independent educational evaluation is enumerated in the Code of Federal Regulations, whereas the IDEA references only a parent's right to an independent educational evaluation generally. However, the Eleventh Circuit recently upheld this provision of the Code of Federal Regulations as valid and not in contradiction to the intentions of Congress. See *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 696 (11th Cir. 2012) (upholding the regulation entitling a parent to a *publicly-funded* independent educational evaluation because Congress, in effect, endorsed the earliest version of the independent evaluation regulation in a 1983 reauthorization of the special education law, and has further renewed the IDEA in 1990, 1997, and 2004 “without altering a parent's right to a publicly funded [independent educational evaluation]”).

107. 34 C.F.R. § 300.502(b).

108. *Id.* This standard places the burden of showing that the evaluation is appropriate on the school district, which serves in contrast to the typical burden of persuasion in administrative due process hearings on all other legal issues, which belongs to the party bringing the action—typically the parent—unless the state has provided otherwise. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (ruling that the burden of persuasion in special education due process hearings is on the

the significance that Congress and the U.S. Department of Education have placed on legal compliance with the evaluation provisions of the IDEA, which serve as the entry point to the entire special education process.

### 1. *Key Child Find and Evaluation Provisions*

The Child Find provision requires that states establish and implement policies to identify, locate, and evaluate children with disabilities who are in need of special education.<sup>109</sup> While parents and certain other individuals enumerated in the IDEA may certainly refer a child for special education,<sup>110</sup> the Child Find obligation requires school districts to take affirmative steps to initiate the special education evaluation process for any child who might require services, regardless of parental request or notification.<sup>111</sup> This provision is a critical tool for diverting children with disabilities from poor educational and life outcomes by ensuring that their disabilities are identified and addressed as early as possible. States must establish methods to “find” children in need of special education who are in public schools and therefore already directly under the purview of state education agencies (SEAs) and the local education agencies (LEAs) within those states.<sup>112</sup> In addition to this basic obligation, states must also have policies in place to “find” all children with disabilities residing in the state, including children who are homeless,

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party bringing the action). Despite the clear responsibility that this provision places on school districts to show the appropriateness of the evaluation, without any burden placed on the parents to provide justifications for their disagreement with the evaluations, in our experience, school districts sometimes try to force parents to indicate the specific reasons for their disagreement with the school evaluation. § 300.502(b)(4). Moreover, reimbursement rates for independent evaluations at public expense are sometimes set by the state at well below market rate, making it difficult for parents to find evaluators who will accept those rates or resulting in the availability only of more limited or lower quality evaluations, which can make meaningless the independent educational evaluation remedy for inadequate school evaluations.

109. 20 U.S.C. § 1412(a)(3)(A) (2012); 34 C.F.R. § 300.111(a) (2013).

110. “[A] parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 20 U.S.C. § 1414(a)(1)(B) (2012).

111. *See id.* § 1412(a)(3).

112. *See id.* State education agencies are responsible for ensuring compliance with the IDEA, while local education agencies within the state must comply with state policies and procedures as a condition of receipt of funding under the IDEA. § 1412(a)(11) (2012); *id.* § 1413(a)(1).

wards of the state, and children in private schools, and highly mobile children such as migrants.<sup>113</sup>

For students with social, emotional and behavioral challenges who are enrolled in school, teachers are in a good position to notice red flags that suggest they may require special education. For example, teachers can flag students' poor or failing grades, grade retention, low performance on standardized tests, chronic illness, school avoidance or other disability-related challenges that may cause the child to be tardy or miss school,<sup>114</sup> ongoing behavioral problems or other mental health concerns, repeated suspensions, transfers from school to school, difficulty staying focused or retaining information, social skills deficits (such as difficulty making friends), or students who are the target or aggressor in bullying situations.<sup>115</sup> Teachers and other school professionals are required to consider whether the child may need to be evaluated for special education if a child is acting out in class behaviorally, seems to be emotionally withdrawn, or struggles with socialization with his or her peers,<sup>116</sup> even if the parent is unaware of any possible disability or has never raised the idea of special education.

The evaluation process may also be triggered when a parent or employee of another state agency, such as a child welfare social worker or a juvenile delinquency system probation officer, requests a special education evaluation.<sup>117</sup> Upon such a request for an initial evaluation of a student, the school district must obtain parental consent to evaluate the child (even if the parent is the one making the request).<sup>118</sup> Within sixty days of receiving that consent or within an

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113. See § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c).

114. Attendance and tardiness problems can be signs that a disability is negatively affecting a child's educational performance, and therefore these factors can help to establish a student's eligibility for special education. See Garda, *supra* note 24, at 301–02.

115. For a discussion of the types of failures that a child in need of special education may have exhibited, but were not acted upon by a school district as required by law, see generally Joseph B. Tulman, *The Special Education Process: Investigating and Initiating the Special Education Case*, in SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 7-2 (Joseph B. Tulman & Joyce A. McGee eds., 1998) [hereinafter SPECIAL ED. ADVOC. UNDER IDEA], available at <http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf>.

116. For example, these characteristics may qualify a student for special education under the disability classification of “emotional disturbance” or may be signs of a student struggling to cope with another unaddressed disability. 34 C.F.R. § 300.8(c)(4)(i) (2013).

117. 20 U.S.C. § 1414(a)(1)(B) (2012); 34 C.F.R. § 300.301(b) (2013).

118. 20 U.S.C. § 1414(a)(1)(B); 34 C.F.R. § 300.301(b).

alternate timeline established by the state,<sup>119</sup> the school district must convene a group that includes the parent and qualified professionals, a group we refer to herein as “the Team,”<sup>120</sup> to determine whether the student is eligible for special education. If the student is eligible for special education, the Team must convene within thirty days to develop an IEP for the student.<sup>121</sup> Because special education evaluations are necessary to help school staff understand a student’s needs, determine his or her eligibility for special education, and then convene to develop an appropriate IEP for that student, it is critical that these evaluations are timely conducted, especially for those students experiencing social, emotional and behavioral difficulties that put them at high risk for the poor outcomes described in Part I.<sup>122</sup>

Once the school obtains consent to evaluate the child, there are a variety of evaluations that can be completed to determine whether a child has a disability and to understand his or her unique educational needs.<sup>123</sup> Examples include a psychological evaluation that assesses the child’s cognitive ability, current levels of academic achievement, and/or social, emotional and behavioral needs, speech/language evaluation, occupational therapy evaluation, and physical therapy evaluation.<sup>124</sup> Evaluations should not simply involve a cursory look at the student, but should provide an in-depth examination of the student’s needs and strengths, using technically sound instruments to “assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.”<sup>125</sup>

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119. 20 U.S.C. § 1414(a)(1)(C)–(D); 34 C.F.R. § 300.300; 300.301(c) (2013). Some state special education laws establish alternate timelines for the evaluation of students. *See, e.g.*, MASS. ANN. LAWS ch. 71B, § 3 (LexisNexis 2013) (establishing timeline of 30 school days for completion of the initial evaluation).

120. 20 U.S.C. § 1414(b)(4); 34 C.F.R. § 300.304(a).

121. While the IDEA provides more simply in 20 U.S.C. § 1414(b)(4) that the eligibility decision must be made by a group that includes the parent and qualified professionals, the law is more specific about the required members of the IEP Team that convenes to develop the IEP within thirty days of that eligibility decision. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); 300.323(c)(1) (2013); *see infra* Part II.B.

122. The IDEA further recognizes the importance of timely evaluations by providing school districts with the opportunity to evaluate a child, even when parental consent is not obtained in certain situations, such as when the agency cannot “discover the whereabouts of the parent,” despite reasonable efforts to do so. 20 U.S.C. § 1414(a)(1)(D)(iii).

123. *See* § 1414(a)(1)(D), (b)(2)(A).

124. *See* Ruth Colker & Michael E. Moritz, *Educational Evaluations and Assessments, in* SPECIAL EDUCATION ADVOCACY, *supra* note 52, at 83, (discussing different types of special education evaluations and their key components).

125. 20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3) (2013).

Specifically, the IDEA provides that a trained and knowledgeable evaluator must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student.<sup>126</sup> The evaluations must also assess the child “in all areas of suspected disability,”<sup>127</sup> thoroughly examining health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor disabilities.<sup>128</sup> The assessments must be tailored to evaluate the specific areas of educational need and may not rely on any single measure or assessment and specifically may not rely solely on a tool designed to provide a single general intelligence quotient, or IQ score.<sup>129</sup>

Students with social, emotional and behavioral challenges may be experiencing a number of different types of disabilities that could be contributing to these challenges,<sup>130</sup> and their needs are complex. The evaluation provisions are well-designed to address the complexity of these students’ needs by requiring evaluators to use a variety of assessment tools and to assess in all areas of suspected disability to determine how disabilities contribute to a student’s needs.

Evaluations must be selected and administered so as not to be racially or culturally discriminatory.<sup>131</sup> A student must also be evaluated in his or her native language, or language or mode of communication that is most likely to yield accurate results as to what the student knows and can do academically, developmentally, and functionally, unless the provision of an evaluation in that language is not feasible.<sup>132</sup>

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126. 20 U.S.C. § 1414(b)(2)(A), (b)(3)(A)(iv).

127. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

128. 20 U.S.C. § 1414(b)(4); 34 C.F.R. § 300.304(c)(4).

129. *See* 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(c)(2).

130. *See supra* Introduction (discussing the different types of disabilities that might be driving social, emotional, and behavioral challenges).

131. *See* 20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1)(i); *see also, e.g.*, *Crawford v. Honig*, 37 F.3d 485, 486–87 (9th Cir. 1994) (reinstating original injunction banning the use of standardized individual IQ tests to evaluate African-American children for placement in classes for the “educable mentally retarded” due to disproportionate enrollment of African-Americans in those classes); *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 972 (9th Cir. 1984) (upholding the ban on nonvalidated IQ tests for African-American students in California on the grounds that the tests were racially and culturally biased and the requirement that remedial plans be implemented to eliminate the disproportionate enrollment of African American students in classes for the “educable mentally retarded”).

132. *See* 20 U.S.C. § 1414(b)(3)(ii); 34 C.F.R. § 300.304(c)(1)(ii).

The IDEA also indicates that an evaluator must consider information provided by the parent.<sup>133</sup> Evaluators must directly interact with and interview a parent or parents—or other caregiver in a parental role—to conduct a legally sufficient evaluation. Parents can provide the history, background, and information necessary to facilitate an effective evaluation, as they often can provide the best information about their children, particularly information that is relevant to understanding their children’s social, emotional and behavioral needs.<sup>134</sup> Indeed, parents typically “know their children’s needs, desires, strengths, weaknesses, personality, and history in nuanced ways that others cannot come close to approaching.”<sup>135</sup>

Evaluations should not simply summarize the results of any assessments conducted, but rather should determine specifically whether the student is a “child with a disability” under special education law.<sup>136</sup> A “child with a disability” is one who is eligible for special education because he or she (1) meets criteria for one of the enumerated special education disability classifications and (2) by reason thereof, needs special education and related services.<sup>137</sup> The federally designated disability classifications, each defined in more detail in the U.S. Department of Education regulations, include mental retardation (a term which has been replaced in some states by other terms, such as “intellectual impairment,” as the term “mental retardation” has become outdated<sup>138</sup>), hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury,

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133. See 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.305(a)(1)(i) (2013).

134. See Justin M. Bathon, *Defining “Parties Aggrieved” Under the Individuals with Disabilities Education Act: Should Parents be Allowed to Represent Their Disabled Child Without an Attorney?*, 29 S. ILL. U. L.J. 507, 507 (2005); see also Yael Zakai Cannon, *Who’s the Boss?: The Need for Thoughtful Identification of the Client(s) in Special Education Cases*, 20 AM. U. J. GENDER SOC. POL’Y & L. 1, 17 (2011).

135. Christine Gottlieb, *Children’s Attorneys’ Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1264 (2006).

136. 20 U.S.C. § 1414(a)(1)(C)(i)(I), (b)(2)(A)(i); 34 C.F.R. § 300.301(c)(2)(i), 300.304(b)(1)(i) (2013).

137. 20 U.S.C. § 1401(3) (2012); 34 C.F.R. § 300.8(a) (2013).

138. See, e.g., CAL. CODE REGS. tit. 5, § 3030(h) (West, Westlaw through Dec. 2013) (defining eligibility for this special education disability classification as “significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil’s educational performance”); 603 MASS. CODE REGS. 28.02(7)(c) (West, Westlaw through Dec. 2013) (using the term “intellectual impairment” for this special education disability classification).



other health impairments, and specific learning disabilities.<sup>139</sup> Evaluators should specifically address in their reports those special education disability classifications, if any, for which the student meets criteria, how those determinations were made, whether the students needs special education as a result and why, and whether the student is consequently eligible for services under the IDEA.<sup>140</sup>

Furthermore, in reviewing evaluations, the Teams usually engage in a focused eligibility determination that walks through these legal requirements.<sup>141</sup> Therefore, it is especially critical that evaluators provide the Team with this information in order to facilitate the appropriate inquiry. Many states have even provided forms for the Team to fill out to ensure that the eligibility criteria have been thoroughly addressed.<sup>142</sup> Some states include additional information in their forms and eligibility criteria, such as a showing that a student has been unable to make educational progress and therefore requires special education.<sup>143</sup> In such states, it is critical that evaluations address all of the various criteria required by state law and by state-issued forms to assist the Team in making the eligibility determinations.

Ideally, evaluations should also include any diagnoses, such as mental disorder diagnoses under the DSM-V<sup>144</sup> or health conditions

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139. 20 U.S.C. § 1401(3)(A)(i); 34 C.F.R. § 300.8(b). Note that while the IDEA enumerates ten disability classifications, the regulations add several more, for a total of thirteen, by adding deafness, deaf-blindness, and multiple disabilities as additional classifications. *Id.* Moreover, many states have their own list of covered disability categories and may have slightly different classifications, or more than or fewer than the thirteen enumerated in the regulations. *See e.g.*, N.J. ADMIN. CODE § 6A:14-2.5 (2013); OHIO ADMIN. CODE 3301-51 (2013).

140. *See e.g.*, 20 U.S.C. § 1401(3); *id.* § 1414(a)(1)(C)(i)(I), (b)(2)(A)(i); 34 C.F.R. § 300.301(c)(2)(i); *id.* § 300.304(b)(1)(i); *id.* § 300.8.

141. *See e.g.*, 20 U.S.C. § 1414(b)(4); 34 C.F.R. § 300.304(a).

142. *See, e.g.*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., SPECIAL EDUCATION ELIGIBILITY/INITIAL AND REEVALUATION DETERMINATION FORM (2000), available at <http://www.doe.mass.edu/sped/iep/forms/pdf/ED1.pdf> (designed to ensure that teams discuss the federal and state criteria for special education eligibility). In Massachusetts, in addition to the federal criteria, a "school age child with a disability" is defined as a school age child in a public or non-public school setting who, because of a disability . . . is unable to progress effectively in regular education and requires special education services. MASS. ANN. LAWS ch. 71B, § 1 (LexisNexis 2013).

143. *See, e.g.*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., *supra* note 142.

144. AM. PSYCHIATRIC ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

the child may have.<sup>145</sup> For a student with social, emotional, and behavioral needs, diagnoses can help the Team understand in better detail the student's needs in and out of school. Evaluations must also determine the student's resulting educational needs, and critically, provide meaningful information and recommendations to help shape the contents of the child's IEP.<sup>146</sup> For students struggling socially, emotionally, and/or behaviorally, concrete recommendations will be critical to helping the Team develop an IEP designed to ensure not only academic, but also social, emotional, and/or behavioral, progress.

Sometimes, the parent has already obtained an evaluation of the child from a source outside of the school, such as by an independent psychologist, indicating the child's need for special education. If the parent provides an evaluation to the school, school officials must review and consider that evaluation as part of the evaluation process.<sup>147</sup>

The IDEA also requires schools to reevaluate eligible students every three years, unless the parent and local education agency agree otherwise. This ensures that students' IEPs are up to date and that their needs continue to be met.<sup>148</sup> This requirement is particularly important for students with social, emotional and behavioral needs, because these needs often shift and evolve over time.

Regardless of whether the evaluation process is initiated by the school through the Child Find process or by the parent or an employee of another state agency, evaluations serve as the entry point to receiving a free appropriate public education under the IDEA. The Child Find obligations and the resulting evaluation process provide mechanisms for early identification of children with disabilities and open the door for those children to receive an

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145. While the IDEA itself does not explicitly require that evaluations include relevant diagnoses, some states have chosen to require this. *See, e.g.*, 603 MASS. CODE REGS. 28.04(2)(c) (West, Westlaw through Dec. 2013) (requiring that evaluations state "the diagnostic impression" of the evaluator).

146. *See e.g.*, 20 U.S.C. § 1414(a)(1)(C)(i)(II), (b)(2)(A)(ii), (b)(3)(C); 34 C.F.R. § 300.301(c)(2)(ii) (2013), *id.* § 300.304(b)(1)(ii).

147. *See* 34 C.F.R. § 300.305(a)(i) (2013); *see also, e.g.*, *Student v. Bos. Pub. Sch.*, BSEA No. 1310180, (Commw. Mass. Div. Admin. L. App. Special Educ. Apps. July 24, 2013), *available at* <http://www.mass.gov/anf/docs/dala/bsea/fy-2013-decisions-and-rulings/13-10180r.pdf> (holding that the school district cannot refuse to discuss an independently obtained evaluation because it would prefer to first conduct its own evaluation).

148. *See e.g.*, 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2013).

appropriate IEP.<sup>149</sup> For children to access the services they require to succeed in school and to prepare for productive lives as adults, children in need of special education must first be identified as early as possible. Because students with social, emotional, and behavioral challenges are often misunderstood, mislabeled, and funneled into more punitive systems, thorough and timely evaluations are especially critical to ensuring that the needs of those students are fully understood and effectively addressed.

## *2. Implementation Failures of Child Find and Evaluation Provisions*

This Part examines a number of key implementation failures related to the Child Find and evaluation provisions in the IDEA and its regulations. First, this Part discusses failures to implement the Child Find requirement that children with disabilities are timely identified, located, and evaluated for special education and argues that these implementation failures can result in significant negative consequences. Second, it maps the implementation failures related to key requirements for the evaluation process and highlights the consequences of such failed implementation. To that end, we begin by examining the failure to act timely on parental requests for evaluations, and then examine in depth the failures to use adequate tools and measurements to evaluate students comprehensively in all areas of suspected disability. Next, this Part highlights other important evaluation-related implementation failures and their consequences, such as the failures to reevaluate students triennially, include parents or guardians in the evaluation process, assess the student in his or her native language or language most likely to yield accurate results, and include in evaluations concrete recommendations regarding disability classifications and IEP components necessary to address the student's needs.

First, many students with disabilities, particularly those with social, emotional, and behavioral difficulties, do not get flagged by educators. Therefore, these students are not evaluated or reevaluated for special education in a timely manner, or evaluated at all, as required by the law's Child Find requirements and related provisions.<sup>150</sup> Failure to locate and evaluate a child who is disabled

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149. See Amy L. MacArdy, *Jamie S. v. Milwaukee Public Schools: Urban Challenges Cause Systemic Violations of The Idea*, 92 MARQ. L. REV. 857, 857 (2009).

150. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 59 (indicating that one in five school-age children has a mental health disorder and 5% have a mental health

and in need of services, to the detriment of that child, constitutes a denial of the right to a free appropriate public education under special education law.<sup>151</sup> Children with disabilities who are not assessed for special education early in their school careers can experience academic failures, instability at home, and behavioral problems in the classroom, all of which can lead to school push-out and incarceration.<sup>152</sup> Too often, we hear from frustrated parents that their teenaged children are facing suspension, expulsion, repeated psychiatric hospitalizations, institutionalization, or incarceration, and that those same teens are reading or writing at an elementary school level—or not at all. Frequently, these children have disabilities that would have been discovered if schools had complied with their Child Find obligations. Instead, our experience shows that, rather than receiving thorough and timely special education evaluations, many children with behavioral problems (particularly those who are

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disorder resulting in extreme functional impairment; noting schools identify just over 0.5% of children as having an “emotional disturbance,” the special education classification that will apply to many students with mental health disorders and just under 1% of children as having “other health impairments,” largely due to Attention Deficit/Hyperactivity Disorder (ADHD); estimating that nearly 3 million potentially eligible students and over one-fourth of the students with serious mental health disorders impairing their education are left out of special education).

151. See *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008); see also *Sch. Bd. of Norfolk v. Brown*, 769 F. Supp. 2d 928 (E.D. Va. 2010) (finding a Child Find violation where the school failed to address adequately a student’s behavioral and psychological issues after having reason to suspect that the student might have a disability and require special education services). “Though case law analyzing the ‘child find’ provisions of the IDEA [is] scarce, failure to comply with the ‘child find’ mandate may constitute a procedural violation of the IDEA.” *Id.* While schools need not identify children immediately in order to comply with Child Find, the Local Education Agency must have procedures in place to ensure that children with disabilities are identified and those procedures will be considered inadequate when a comparatively low number of students are located and timely served. See, e.g., *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012) (adopting a “reasonable time” standard because the IDEA does not establish a deadline by which children who are suspected of having a disability must be identified and evaluated); *D.L. v. District of Columbia*, 730 F. Supp. 2d 84 (D.D.C. 2010) (finding that the District of Columbia failed to meet its Child Find obligations where it would be expected that 6% of preschool-age children would be found disabled, based on city demographics, and only 2–3% were served; further, 66% or fewer received an eligibility determination within 120 days of referral, in violation of D.C.’s evaluation timeline). But see *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013) (vacating orders certifying the class, finding liability, and requiring relief and remanding for the lower court to determine whether any class, classes, or subclasses may be certified in light of this decision).

152. See e.g., Cannon, *supra* note 87, at 1056–57; Julia C. Dimoff, *The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health*, 6 DEPAUL J. HEALTH CARE L. 319, 321 (2003); Rivkin, *supra* note 29 at 919.

children of color living in poverty) are often excluded from the classroom, the school, and even the community through punitive measures, effectively resulting in these children becoming “someone else’s problem.”<sup>153</sup>

Unfortunately, the failure to implement Child Find can sometimes mean that a child’s special education needs are only discovered when a court-ordered evaluation through the delinquency system reveals a disability and significant unmet service needs.<sup>154</sup> In one of our cases, “David” was experiencing serious academic failures, unable to read at age fourteen. Because he did not understand much of what he was supposed to be learning at school and felt stupid and confused much of the time, he started skipping school and found companionship among a group of young people who vandalized local buildings. When David was arrested for vandalism, his public defender suspected that he did not understand many of their conversations and could not read the paperwork they were reviewing related to David’s legal case. The attorney requested a psychological evaluation to assess David’s competency to stand trial, and the evaluation revealed that David had cognitive disabilities and autism that rendered him incompetent to stand trial, and that he should have received special education services at a young age.

When a school fails in its Child Find obligations and a child’s disabilities are discovered at an older age, it may be too late to reverse the course of school push-out and incarceration.

In addition to Child Find violations, we have seen many schools violate the legal requirements for evaluations. For example, when parents express concern about their children’s development to school officials or request special education evaluations, school officials sometimes discourage parents from proceeding with the special education process, ignore parental requests altogether, encourage parents to explore interventions outside of school or lower level school-based interventions short of the necessary special education services, or delay far longer than the timelines prescribed by the state

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153. See generally BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 59.

154. A high percentage of children in the juvenile justice system qualify for at least one mental health diagnosis. For many of these children, those disorders are undiagnosed prior to their entry into the delinquency system, and the behaviors leading to their offenses may be manifestations of their untreated disorders. See Cannon, *supra* note 87, at 1087; see also Nancy Rappaport et al., *Beyond Psychopathology: Assessing Seriously Disruptive Students In School Settings*, 149 J. PEDIATRICS 252 (2006) (finding that a sample of 33 students suspended for 10 days or more in an urban school district had an average of three undiagnosed mental health disorders).

in initiating the evaluation process. Not only can these responses dishearten and alienate parents who are often already frustrated, they also cause delays in the evaluation process that need to begin so that students can receive the special education services they require to make meaningful academic progress.

When schools do act on Child Find or parental requests to evaluate students for special education, we frequently see evaluations that fail to use a variety of assessment tools or that fail to evaluate the students in all areas of suspected disability. These cases find their way to us because even after the evaluations are completed, the students are still struggling without a complete identification and understanding of their disabilities and related needs.

Many of these students initially have been evaluated using inadequate tools and measurements to assess all areas of suspected disability. It is not uncommon to see special education evaluations for students with social, emotional, and behavioral challenges that examine only two things: (1) a child's cognitive capacities, often measured by an intelligence quotient (IQ) test such as the Wechsler Intelligence Scale for Children<sup>155</sup> and (2) current academic functioning, often measured by achievement testing such as the Woodcock Johnson III Tests of Achievement.<sup>156</sup> While these assessments together can help an evaluator understand whether a child may have a learning disability,<sup>157</sup> they do not evaluate more

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155. David Wechsler, *Intelligence Scale for Children—Fourth Edition*, PEARSON, <http://www.pearsonclinical.com/education/products/100000310/wechsler-intelligence-scale-for-children-fourth-edition-wisc-iv.html> (last visited Dec. 18, 2013); see also Mary G. Hynes, *The Special Education Process: Evaluations*, in SPECIAL ED. ADVOC. UNDER IDEA, *supra* note 115, at 8-6.

156. See BARBARA J. WENDLING ET AL., EDUCATION INTERVENTIONS RELATED TO THE WOODCOCK-JOHNSON III TESTS OF ACHIEVEMENT (2007), *available at* [http://www.riversidepublishing.com/clinical/pdf/WJIII\\_ASB8.pdf](http://www.riversidepublishing.com/clinical/pdf/WJIII_ASB8.pdf) (describing the Woodcock Johnson-III and the instructional interventions that can be used for students with deficits in its particular areas of assessment); see also Hynes, *supra* note 155, at 8-7.

157. See Hynes, *supra* note 155, at 8-6 to 8-7. An achievement test and an IQ test together can help an evaluator determine whether the student has a learning disability based on a finding of a discrepancy between achievement and intellectual ability. However, for the determination of a student's eligibility for special education as a child with a specific learning disability under the IDEA, the statute indicates that a local education agency shall not be required to take into account this discrepancy. Further, the local education agency can use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures, a process known as "response to intervention" (RTI). See 20 U.S.C. § 1414(b)(6) (2012). Accordingly, some states now provide for both a discrepancy model and RTI procedures. See, e.g., N.M. Code R. § 6.31.2.10(C) (West, Westlaw through 2012 rules). Where the discrepancy model has been phased out and RTI is

broadly for possible emotional disorders, attention disorders, autism, or other disabilities. For a child with social, emotional, or behavioral difficulties, an evaluation that only includes cognitive and achievement assessments will typically fail to assess fully all possible areas of disability and will provide an incomplete picture of the child's needs.

Sometimes these incomplete evaluations stem from school officials' and/or evaluators' failure to recognize emotional and behavioral difficulties as possibly stemming from a disability, resulting in a narrow, limited picture of a child's needs. A broader, legally compliant evaluation assessing all areas of suspected disability for a child with such difficulties should frequently include a clinical psychological component,<sup>158</sup> rather than solely cognitive and academic achievement testing. Clinical psychological assessments might include those that evaluate for ADHD, such as the Conners' Index Scale;<sup>159</sup> tools that examine behaviors and emotions, such as the Behavior Assessment System for Children (BASC);<sup>160</sup> projective tests to assess personality and underlying thoughts and experiences, such as the Rorschach inkblot test or the Thematic Apperception Test (TAT),<sup>161</sup> which may reveal that a child has suffered a trauma, and/or interviews with the parent and child.

Likewise, some students may need other specific assessments by a psychologist to examine in further depth their executive functioning,<sup>162</sup> memory,<sup>163</sup> reading capacities,<sup>164</sup> or adaptive life skills.<sup>165</sup>

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required, an achievement test and IQ test are no longer sufficient to establish eligibility for special education under the specific learning disability criteria. *See* Ruth Colker, *Educational Evaluations and Assessments*, in SPECIAL EDUCATION ADVOCACY *supra* note 52, at 116

158. *See* Hynes, *supra* note 155, at 8-6 to 8-7.

159. *See* *Conners 3rd Edition*, MULTI-HEALTH SYSTEMS, INC., <http://www.mhs.com/product.aspx?gr=cli&id=overview&prod=conners3> (last visited Dec. 18, 2013).

160. *Behavior Assessment System for Children, Second Edition*, PEARSON, <http://www.pearsonclinical.com/psychology/products/100000658/behavior-assessment-system-for-children-second-edition-basc-2.html> (last visited Dec. 18, 2013); *see also* SHARON RINGWALT, NAT'L EARLY CHILDHOOD TECHNICAL ASSISTANCE CTR., DEVELOPMENTAL SCREENING AND ASSESSMENT INSTRUMENTS WITH AN EMPHASIS ON SOCIAL AND EMOTIONAL DEVELOPMENT FOR YOUNG CHILDREN AGES BIRTH THROUGH FIVE 17 (2008), *available at* <http://www.nectac.org/~pdfs/pubs/screening.pdf>.

161. *See* WADE SILVERMAN, CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 930 (H. Kenneth Walker et al. eds., 1990).

162. *See* GERARD A. GIOIA ET AL., BRIEF: BEHAVIOR RATING INVENTORY OF EXECUTIVE FUNCTION (2005) (assessing executive function behaviors in the school and home environments of a broad range of children and adolescents, including those with learning disabilities and attention disorders, traumatic brain injuries, lead

Furthermore, in violation of the requirement that evaluations address areas such as health status, hearing, vision, communicative status, and motor disabilities, if appropriate,<sup>166</sup> we often see schools fail to include the neurological, auditory, vision, speech/language, physical therapy, or occupational therapy evaluations that may be necessary to explore these additional realms of possible need.<sup>167</sup> Even when all areas of suspected disability are assessed, if a student is evaluated by more than one evaluator, such as a psychologist, a speech and language pathologist, and an occupational therapist, those evaluators frequently fail to coordinate their findings with each other. Rather than communicate or read each other's reports to see how they inform each other's findings, in our experience, evaluators often each report their individual results in a siloed fashion. This approach falls short of the information-sharing process and comprehensive examination of a student's needs that the IDEA envisions—and that are particularly critical for students with social, emotional, and behavioral challenges.

The importance of assessing a child comprehensively and in all areas of disability should not be underestimated; failure to do so frequently means that the Team will be without the information needed to develop an appropriate IEP for the child.<sup>168</sup> Unfortunately,

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exposure, pervasive developmental disorders, depression, and other developmental, neurological, psychiatric, and medical conditions).

163. See, e.g., *Wide Range Assessment of Memory and Learning, Second Edition*, PAR, INC., <http://www4.parinc.com/Products/Product.aspx?ProductID=WRAML2> (last visited Dec. 18, 2013) (assessing an individual's memory functioning, including immediate and delayed memory ability, as well as the acquisition of new learning).

164. See, e.g., *Gray Oral Reading Test—Fifth Edition*, PEARSON, <http://www.pearsonclinical.com.au/productdetails/487/1/8> (last visited Dec. 18, 2013). The *Gray Oral Reading Tests*, are widely used measures of oral reading fluency and comprehension in the United States.

165. See *Vineland Adaptive Behavior Scales, Second Edition*, PEARSON, <http://www.pearsonclinical.com/psychology/products/100000668/vineland-adaptive-behavior-scales-second-edition-vineland-ii-vinelandii.html?Pid=Vineland-II> (last visited Dec. 18, 2013) (measuring adaptive behavior, personal and social skills needed for everyday living to identify individuals who have Intellectual and Developmental Disabilities, developmental delays, autism spectrum disorders, and other impairments, and providing information to assist in developing educational and treatment plans).

166. See, e.g., 20 U.S.C. § 1414(b)(4) (2012); 34 C.F.R. § 300.304(c)(4) (2013).

167. See Joseph B. Tulman & Milton C. Lee, *Strategies for Using Special Education Law to Improve the Outcome of an Individual Delinquency Case*, in SPECIAL ED. ADVOC. UNDER IDEA, *supra* note 115, at 2–16.

168. Violations of the IDEA can occur when a child is assessed in only some areas where a disability is suspected and not all areas, which can leave the Team without the information needed to develop an effective IEP. For example, in *K.I. v. Montgomery Public Schools*, the court found a school district in violation of the



the “failure to assess in all areas of suspected disability is necessarily linked to the failure to provide services to meet each of the child’s needs. If the need is never identified, it cannot be met.”<sup>169</sup> In this way, the failure to evaluate a student in all areas of suspected disability can result in a denial of that student’s right to a free appropriate public education under the IDEA,<sup>170</sup> and poor outcomes for students with social, emotional, and behavioral difficulties.

One of our cases exemplifies this problem. At age fourteen, “Tanya” was repeating the eighth grade. A Team convened to discuss the teachers’ concerns about Tanya. She was struggling greatly in math, but also seemed to have difficulty expressing herself verbally and in writing in all of her academic subject areas, where she was receiving mostly Cs and Ds. She received in-school suspensions frequently for failing to follow directions. Her teacher observed that it seemed to take her more time to process what she was being told, and to formulate words, noting that Tanya might benefit from a speech and language evaluation. Tanya’s mother also explained that Tanya had been diagnosed a few years ago with depression, and that her depression could be contributing to her behavior and academic challenges as well.

The Team agreed that Tanya should be evaluated for special education, and Tanya’s mother provided consent. However, five months passed before Tanya’s evaluation was conducted. The evaluation report that was ultimately provided indicated that the evaluating psychologist only used one tool: a test to determine Tanya’s IQ. The psychologist concluded that Tanya did not meet criteria for a cognitive disability on the basis of that one assessment. No assessments were conducted to explore whether Tanya suffered from a speech and language impairment based on her teacher’s concerns or an emotional disturbance based on her depression. Tanya was denied special education eligibility by her school, and began to experience a number of poor outcomes. While Tanya and the Team members had waited five months for the evaluation report

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IDEA when the district had provided a disabled child with specialized services for her physical disabilities, but failed to evaluate her cognitive skills. The court noted, “Without a cognitive or assistive technology assessment, MPS [was] unable to design suitable goals for K.I. And without the ability to design goals, they [were] unable to develop an adequate IEP.” Weber, *supra* note 103, at 302–03 (quoting 805 F. Supp. 2d 1283 (M.D. Ala. 2011)).

169. Weber, *supra* note 103, at 303.

170. See *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008) (finding that the failure to assess a student for suspected autism resulted in a denial to that student of a free appropriate public education).

to be completed, her grades plummeted to all Fs and she faced the prospect of repeating eighth grade yet again. Her depression escalated and Tanya was psychiatrically hospitalized.

To comply with the IDEA and its accompanying regulations, the evaluation should have been conducted within the sixty-day timeline,<sup>171</sup> used a variety of tailored standardized tools and measurements<sup>172</sup> to assess her in all areas of suspected disability,<sup>173</sup> and discussed which disability classification criteria she met<sup>174</sup> and her resulting educational needs.<sup>175</sup> Such an evaluation would have provided the Team with a timely and complete picture of Tanya's disabilities and the IEP she required to address them. She could have received special education services to stabilize her emotionally and help her make academic progress, and the poor outcomes she experienced possibly could have been avoided.

In addition to these types of failures, we also see schools fail to reevaluate students every three years or fail to reevaluate more frequently those students for whom a shorter timeline may be necessary.<sup>176</sup> The needs of students with social, emotional, and behavioral difficulties may change quickly, and either a crisis or a newfound stability may necessitate a reevaluation to reexamine a student's educational needs. For example, a student who spends several hours per week out of the classroom with a counselor to address her instability following a psychiatric hospitalization may need a reevaluation to examine her changed circumstances once her condition stabilizes, even if the three-year timeline has not run. It may be detrimental for that student to continue to miss classroom instruction for such frequent counseling, and a reevaluation could help the Team understand whether and how best to reduce those counseling hours and make the transition back to the classroom during those times as smooth as possible.

Additionally, we see many evaluations that fail to include a parent or guardian in the process. An evaluation in which the evaluator never reached out to a parent or guardian for information might present a red flag that the evaluation provides an incomplete picture

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171. *See, e.g.*, 20 U.S.C. §§ 1414(a)(1)(C)–(D); 34 C.F.R. § 300.300; *id.* § 300.301(c) (2013).

172. *See* 20 U.S.C. § 1414(b)(2)(A).

173. *See, e.g.*, 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2013).

174. *See, e.g.*, 20 U.S.C. § 1414(a)(1)(C)(i)(I), (b)(2)(A)(i); 34 C.F.R. § 300.301(c)(2)(i); *id.* § 300.304(b)(1)(i).

175. *See, e.g.*, 20 U.S.C. § 1414(a)(1)(C)(i)(II), (b)(2)(A)(ii), (b)(3)(C); 34 C.F.R. § 300.301(c)(2)(ii); *id.* § 300.304(b)(1)(ii).

176. *See, e.g.*, 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2013).

of the child. An evaluation that does not explore the child's history and current functioning with a parent will often lack critical information.<sup>177</sup> For example, the parent or guardian may have information about a child's behavior at home or prior diagnoses that could shape the results of an evaluation. Likewise, information that the child witnessed domestic violence or experienced other trauma at a young age, or has exhibited recent concerning behaviors at home could change the entire outcome of an evaluation. Parents and guardians of children with social, emotional and behavioral challenges in particular "undoubtedly are experts in the everyday lives of children"<sup>178</sup> and must be consulted to gain a full picture of the child's needs.

Moreover, we sometimes see evaluations that violate the IDEA by failing to assess a student in his or her native language, or the language most likely to yield accurate results for that student.<sup>179</sup> When a student is assessed in a language in which he or she does not feel comfortable, the results of that evaluation may be completely inaccurate. "Ali's" case demonstrates both a failure to evaluate a student in his native language and the failure to include important information from the parent in the evaluation process. Ali's mother was relieved when her son's school asked for her consent to evaluate him for special education, as she had been having concerns about the reports she received about his bad behavior and poor academic achievement. Unfortunately, Ali's mother never heard from the school again until the evaluation was completed and it was time to develop an IEP. The evaluation assessed Ali in English, a language which he was just learning as a new immigrant to the United States. Ali was still most comfortable speaking in Arabic and therefore did not engage with the evaluating psychologist during much of the evaluation process. The report concluded that Ali's frequent silence in the classroom was a sign of stubbornness, perhaps associated with autism or even a conduct disorder. Ali's mother was extremely concerned about the incomplete and inaccurate picture the evaluation painted of her son.

In fact, there had been complications with her pregnancy and Ali had been born prematurely. The doctors had diagnosed him with a

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177. Congress specifically indicated that evaluations should consider any information provided by the parent in recognition of the critical role that parents should play in the evaluation process. *See e.g.*, 20 U.S.C. § 1414(b)(2)(A), (b)(3)(A)(iv); 34 C.F.R. § 300.305(a)(1)(i) (2013).

178. *See* Bathon, *supra* note 134, at 507.

179. *See e.g.*, 20 U.S.C. § 1414(b)(3)(ii); 34 C.F.R. § 300.304(c)(1)(ii).

moderate cognitive disability. He had always struggled with his speech, but responded well to speech and language therapy for the brief time that he had received that service in his native Morocco. Ali's mother agreed with his new pediatrician, who had recommended to her that Ali could begin to make educational progress with a small classroom, individualized instruction from a special education teacher trained to work with children with cognitive disabilities, English instruction targeted at students with limited English proficiency and tailored to his special needs, and intensive speech and language therapy in school. However, because Ali's evaluation failed to assess him in Arabic and the evaluating psychologist failed to communicate with Ali's mother in the course of conducting the evaluation, none of this information was included. The Team lacked the tools it needed to understand Ali's disabilities or his special education needs and their relationship to his limited English proficiency. Without this information, the Team could not develop an effective IEP for Ali. As a result, he continued to go without critical services in school and remained silent and confused in the classroom the majority of the time.

In addition to such failures to consult with parents in the evaluation process and to evaluate the student in the appropriate language, we frequently see evaluations that violate the law and regulations by failing to make any recommendations whatsoever as to a child's qualifications for specific diagnoses, special education disability classifications, or educational needs<sup>180</sup>—rendering the process of developing an effective special education plan infinitely more difficult. Some evaluations we see will simply provide raw data on a child's scores on various assessment tools, without interpreting that data in any useful way or providing diagnoses, information as to whether the child meets eligibility criteria for any special education disability classifications, or recommendations as to a child's educational needs. Sometimes those evaluation reports will simply recommend that the Team review the evaluation data and determine the disability classifications for which the child might qualify and any services the Team thinks the child needs as a result.

Such evaluations can leave Team members either confused or in disagreement over the child's needs and without the information they need to develop the IEP. For a student with social, emotional, and behavioral challenges, the complexities of the student's disabilities

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180. *See supra* Part II.A.1 (discussing these requirements for evaluations found in the IDEA and regulations).

and the services, supports, and accommodations that are necessary to address those disabilities can be very difficult to discern without concrete diagnoses, information about disability classification criteria, the reasons why the student requires special education, and recommendations from an evaluator.

We also see evaluations that provide recommendations solely on a child's needs outside of school. For example, for a child with behavioral difficulties in school, such an evaluation might only recommend that the parent work with a family therapist outside of school to learn better strategies for controlling the child. Sometimes the evaluation simply recommends that the parent medicate the child without any school-related recommendations, or suggests that a child be medicated as a condition of attending school or receiving special education services, in violation of the IDEA.<sup>181</sup> Without any recommendations as to what the child needs *in school*, such an evaluation is not useful to the special education process. Further, in our experience, some evaluations make recommendations only for steps the parent and child should take on their own and fail to indicate the types of services, accommodations, or classroom placement the school should provide in order for the child to benefit educationally. In contrast, in order to be legally compliant and useful, special education evaluations should give parents and teachers information that concretely assists the team in developing these key components of the IEP.<sup>182</sup>

When evaluations do comply with the IDEA provisions and related regulations we have emphasized herein, we have seen students with social, emotional, and behavioral challenges begin to thrive and avert the poor outcomes that studies indicate are all too common.<sup>183</sup> For example, Tanya, who was in danger of repeating the eighth grade a third time, as described above, received another round of special education evaluations following her mother's request that the school reevaluate Tanya more thoroughly. The new evaluations included a clinical psychological evaluation examining Tanya's social, emotional, and behavioral functioning. The evaluation concluded that Tanya's mild depression had escalated to Major Depressive Disorder, which

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181. See 20 U.S.C. § 1412(a)(25) (2012) (providing that the SEA must prohibit SEA and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation, or receiving special education services).

182. See *infra* Part II.B.1 (discussing the IDEA and regulatory requirements for the IEP process).

183. See *infra* Part I.

was affecting her education negatively, and that she required counseling services in order to cope during the school day. A speech and language pathologist also evaluated Tanya based on her teacher's concerns and concluded that Tanya suffered from both Receptive and Expressive Language Disorders. She required speech and language therapy weekly and directions both verbally and in writing for her school assignments in order to process and communicate effectively in an academic setting. Armed with thorough evaluations assessing Tanya in all areas of suspected disability and providing concrete diagnoses and robust recommendations, the Team found Tanya eligible for special education and developed a strong IEP for her. Within a month, Tanya's suspensions stopped, her grades were improving and she was promoted at the end of the school year to the ninth grade. As was the case for Tanya, effective and thorough evaluations that comply with the IDEA can make a tremendous difference in ensuring that the child receives the necessary services and succeeds educationally.

When states and school districts fail to implement "Child Find" by failing to identify that a student may be in need of special education, the special education process never even begins for that child. Furthermore, when schools fail to thoroughly and effectively evaluate a student for special education, in violation of the IDEA, teachers and parents lack the information they need to design an effective IEP addressing all areas of need. For students struggling with social, emotional, and behavioral problems, those problems will frequently only escalate as their disabilities go unidentified and unaddressed, contributing to poor outcomes.

## B. The IEP Process

The IEP process represents the heart of special education.<sup>184</sup> Congress' powerful vision was that, for each child with a disability, the school would convene a team of knowledgeable professionals along with the parent<sup>185</sup> (and, where appropriate, the student) to

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184. See 20 U.S.C. § 1401(9) (2012) (defining free appropriate public education to mean "special education and related services that . . . are provided in conformity with the individualized education program"); see also, *Honig v. Doe*, 484 U.S. 305, 311 (1988) (describing how Congress "[e]nvision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children").

185. The IDEA defines the term "parent" to include natural, adoptive, and foster parents; guardians; individuals acting in the place of natural or adoptive parents with whom a child lives; individuals who are legally responsible for a child's welfare; and individuals assigned to be surrogate parents. See 20 U.S.C. § 1401(23). This Article uses the term "parent" to refer to all of these individuals.

analyze the student's unique educational needs and customize an IEP that would enable him or her to make progress.<sup>186</sup> Embodying the values of collaboration, inclusion, individuality, and a holistic approach to children's needs, the IEP process might appear to be the perfect antidote to the adverse outcomes we have reviewed above: an individualized problem-solving process devoted to the specific needs of each student with a disability.<sup>187</sup> While we contend that the process imagined by Congress does indeed hold this promise, many parents and educators alike can attest that IEP Team meetings are often far from the cooperative, generative brainstorming sessions the law envisions.<sup>188</sup>

### 1. Key IEP Process Provisions

The IDEA requires that an IEP be developed for every student with a disability who is identified as eligible to receive services.<sup>189</sup> This robust document constitutes the blueprint for the student's education, including both the "inputs" that the school is responsible to provide and the "outcomes" that the student is expected to

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186. See S. REP. NO. 94-168 at 1435 (1975). Congress described its intent with respect to the "individual planning conferences," or what has now come to be called IEP meetings:

[I]t is the intent of this provision that local educational agencies involve the parent at the beginning of and at other times during the year regarding the provision of specific services and short-term instructional objectives for the special education of the handicapped child, which services are specifically designed to meet the child's individual needs and problems. The Committee views this process as a method of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parent with a written statement of what the school intends to do for the handicapped child.

*Id.*

187. See *id.*

188. See PAM WRIGHT & PETE WRIGHT, FROM EMOTIONS TO ADVOCACY 41 (2d ed. 2006) (devoting a chapter to "Resolving Parent-School Conflict" and describing conflict between parents and schools as "normal and inevitable"). See generally David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166; Stephen A. Rosenbaum, *When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL'Y 159 (2001). One parent's sarcasm hints at the discomfort in these meetings even for middle class parents: "For those unfamiliar with this concept, a team meeting is like a celebrity roast without the jokes. You are thrown into a room with five, six, or sixteen hundred teachers who tell you everything that's wrong with your child (the celebrity)." GINA GALLAGHER & PATRICIA KONJOIAN, SHUT UP ABOUT YOUR PERFECT KID: A SURVIVAL GUIDE FOR ORDINARY PARENTS OF SPECIAL CHILDREN 25 (2010).

189. See 20 U.S.C. § 1414(b)(2)(A) (2012).

achieve.<sup>190</sup> Congress was comprehensive in outlining the required components of the IEP, which include a statement of the child's current performance and functioning; measurable annual goals, including *how* progress towards the goals will be measured; a statement of all special education and related services<sup>191</sup> the student is to receive, including their frequency, location and duration; if applicable, an explanation of why the student is to be removed from a mainstream classroom; a statement of accommodations the student requires on standardized testing; and, beginning at age sixteen, measurable postsecondary goals and a statement of the transition services necessary to help the student meet them.<sup>192</sup> In addition to identifying all of these components of the IEP itself, the Team also has to determine the setting, or placement, in which they should be delivered to the student.<sup>193</sup>

Paralleling this extensive list of requirements for the IEP's content, the IDEA also contains detailed provisions regarding the process schools must use for its development. The law places a high priority on parents' participation in the IEP process<sup>194</sup> and includes parents as

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190. See Rosenbaum et al., *supra* note 28, at 117 ("The IEP is a 'blueprint' for the delivery of services."); Jane R. Wettach & Brenda Berlin, *The IEP, in SPECIAL EDUCATION ADVOCACY*, *supra* note 52, at 149, 152 ("The IEP is both a process and a document; it is the roadmap for the delivery of the education and services necessary to address the child's unique needs.").

191. See *infra* Part II.C, for a detailed discussion of related services.

192. See § 1414(d)(1)(A)(i). Note that, with respect to transition services, some states require that they be included in the IEP beginning earlier than age 16. See, e.g., MASS. ANN. LAWS ch. 71B, § 2 (LexisNexis 2013) (requiring that schools provide students with transition services "[b]eginning at age 14 or sooner if determined appropriate" by the IEP Team).

193. The Team must ensure that the student's placement is determined at least annually, is based on the student's IEP, and is as close to the student's home as possible. See 34 C.F.R. § 300.116(b) (2013). It is also the school district's responsibility to ensure that "a continuum" of placements is available to meet a range of students' needs, including "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." See 34 C.F.R. § 300.115 (2013). In deciding among the available placement options, the Team must be guided by the statute's least restrictive environment (LRE) presumption, which requires that the student be educated with nondisabled peers to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5) (2012). For a general discussion of the placement determination and of LRE considerations, see Wettach & Berlin, *supra* note 190, at 175–78. For a discussion of placement of students with social, emotional and behavioral challenges in the context of suggestions for reform, see *infra* Part III.

194. This priority is reflected in the IDEA's section of Congressional findings, which states that "the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring families of such children have meaningful opportunities to participate in the education of their children at school and at home." 20 U.S.C. § 1400(c)(5)(B) (2012). Legislative history also documents Congress's emphasis on parental involvement



members of the Team that makes decisions about the IEP.<sup>195</sup> The Team is meant to be an interdisciplinary group of professionals who know the child and who have expertise in educating students with similar needs. In addition to parents, it must include at least one of the student's regular education teachers (if any);<sup>196</sup> at least one special education teacher or provider;<sup>197</sup> a district official who is qualified to provide or supervise specially designed instruction and who is knowledgeable about both the general education curriculum and the availability of resources in the district;<sup>198</sup> and, where appropriate, the student herself.<sup>199</sup> The IDEA also requires that the Team include a professional who is able to interpret the instructional implications of any evaluations that have been completed;<sup>200</sup> in practice, this usually means that each individual who has conducted an evaluation, whether an employee of the district or as an independent evaluator selected by the parent, should attend the Team meeting to explain his or her findings and recommendations.<sup>201</sup> Finally, both the school and the parent are given discretion to invite other people who have knowledge or special expertise regarding the student to participate as part of the Team; such individuals can include therapists, social workers, other family members, and attorneys.<sup>202</sup>

Once a student is found eligible, the Team must reconvene at least once a year to review the IEP and revise it as necessary.<sup>203</sup> In developing and revising the IEP, the Team must engage in a holistic discussion about the student, meaning that it must consider the

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when it reauthorized the IDEA in 2004. *See* H.R. REP. 108-77, at 105 (2003) ("Empowering parents to be more involved in the decisions about the education of their child is the focus of many changes in section 614. The Committee feels that parents should be integral partners in the development of their child's IEP and has made several changes to the development process of the IEP to empower parents to establish effective working relationships with their child's school to develop effective IEPs.").

195. 20 U.S.C. § 1414(d)(1)(B)(i). In addition to this general requirement that the IEP Team must include parents, the IDEA also separately requires that parents are part of any group that makes decisions on the educational placement of their child. *See* § 1414(e).

196. § 1414 (d)(1)(B)(ii).

197. § 1414 (d)(1)(B)(iii).

198. § 1414 (d)(1)(B)(iv).

199. § 1414 (d)(1)(B)(vii).

200. § 1414 (d)(1)(B)(v).

201. *But see* WETTACH & BERLIN, *supra* note 190, at 156–57 (pointing out that the IDEA "does not require that the actual evaluator be present at the meeting to interpret his or her results").

202. *See* § 1414 (d)(1)(B)(vi); *see also* Wettach & Berlin, *supra* note 190, at 157.

203. *See* § 1414 (d)(4)(A).

student's needs in academic, developmental, and functional areas and review the results of all evaluations that have been conducted of the child.<sup>204</sup> It must also factor in the student's strengths and consider any concerns raised by parents.<sup>205</sup> For students who experience behavioral difficulties, the Team must consider the use of positive behavior supports and other strategies to address the behavior.<sup>206</sup>

Taken together, all of these substantive and procedural requirements regarding the IEP establish a structure that is well designed to address the needs of students with social, emotional, and behavioral disabilities. Many of the students with whom we work have highly complex needs and are served by multiple systems and agencies;<sup>207</sup> when it works as intended, the IEP process provides a mechanism to bring everyone together around the same table and gather as much information about a student as possible.

## 2. Implementation Failures of the IEP Process Provisions

For too many of the families we represent, however, the IEP Team meeting does not generate the positive outcomes for which it was designed. Even when the system works as it should to identify, locate, and evaluate children for special education, many students remain un- or under-served because of missteps that occur as part of the IEP process. This process is a complicated one, particularly for parents who may be going through it for the first time.<sup>208</sup>

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204. § 1414 (d)(3)(A).

205. § 1414 (d)(3)(A).

206. § 1414 (d)(3)(B)(i). For additional discussion of positive behavior supports and the IDEA, see *infra* Part II.D.

207. See, e.g., Peter E. Leone & Margaret J. McLaughlin, *Appropriate Placement of Students with Emotional and Behavioral Disorders: Emerging Policy Options*, in ISSUES IN EDUCATIONAL PLACEMENT: STUDENTS WITH EMOTIONAL AND BEHAVIORAL DISORDERS 335, 348 (James M. Kauffman et al. eds., 1995) (noting that for students with emotional and behavioral disorders “[a]ppropriate placement and services often require cooperation from mental health, social services, health, and juvenile justice agencies, as well as education”). The IEP meeting becomes a particularly important site for collaboration in jurisdictions where these students receive home- or community-based wraparound mental health services. See, e.g., *Children's Behavioral Health Initiative: New MassHealth Behavioral Health Services: Collaborating to Serve the Whole Child*, MASSHEALTH (Mar. 3, 2008), <http://www.mass.gov/eohhs/docs/masshealth/cbhi/presentation-for-school-personal.pdf>. Interagency collaboration is also critical when a student begins receiving transition services that often involve other state and community agencies. See Cannon, *supra* note 87, at 1078.

208. Professor Caruso describes the complexities of the IEP process that confront parents of children with disabilities, particularly “the injection of negotiation elements” and resulting “specter of substantive bargaining inequality.” Caruso, *supra* note 13, at 180. Congress has also conveyed its concern about the complexities of the

For many of the parents we represent—especially single parents, parents who work multiple jobs, and parents with infants who do not have childcare—the first stumbling block is often not even being able to attend meetings when school officials schedule them. The law requires schools to take reasonable measures to ensure the parent’s availability, including scheduling meetings at a mutually agreeable time and place.<sup>209</sup> Frequently, rather than contacting the parent to arrange a date and time, schools will send home written notice, often in a child’s backpack, that a meeting has been scheduled at a time pre-selected by the school. If the parent is not available at that time or does not show up, it is not uncommon for the meeting to be held without his or her participation.<sup>210</sup> Parents often face tremendous

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process for many parents. *See* H.R. REP. 108-77, at 110 (2003) (“One of the top goals for the Committee is to reduce the unnecessary complications and processes involved in the IEP in order to give parents greater control over the IEP.”).

209. Federal regulations require that schools

take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.

34 C.F.R. § 300.322(a) (2013). The regulations elaborate on this general requirement, emphasizing the limited circumstances in which it is acceptable for schools to proceed with an IEP meeting without parental participation. *See* § 300.322(c) (“If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls . . . .”); § 300.322(d) (“A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—(1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parents and any responses received; and (3) Detailed records of visits made to the parent’s home or place of employment and the results of those visits.”). To ensure that parents’ participation is meaningful, the regulations also require that they be provided notice of the purpose of the meeting, of who has been invited, including whether the child or providers from other agencies have been invited, and of their right to invite individuals of their choosing who have special knowledge or expertise about the child. *See id.* § 300.322(b).

210. Congress attempted to address this concern in the 2004 reauthorization by explicitly allowing for alternative means of meeting participation. *See* 20 U.S.C. § 1414(f) (specifically allowing for IEP Team meetings to happen through video conferences and conference calls); *see also* H.R. REP. 108-77, at 112 (2003) (“Often parents or other IEP Team members cannot attend in person the entire IEP Team meeting. This option will allow all members to participate in the meeting in a way that is constructive.”). *But see* S. REP. NO. 108-185, at 32 (2003) (noting that certain meetings, particularly those involving the procedural safeguards in § 1415, are probably best held in person). For many of our clients who do not have access to the technologies referenced in the law, this new provision may not actually overcome participation barriers.

pressure when forced to choose between attending special education meetings and fulfilling the other obligations in their lives. For example, one of our clients—“Ms. Ortiz”—was threatened with the loss of her job as a parking attendant at a local university because she had to keep asking for time off to attend meetings at school during the workday.

Parents who are non-English speakers (or who communicate in American Sign Language or another mode of communication) encounter an additional set of challenges. Schools commonly fail to fulfill the IDEA’s requirement that they provide an interpreter for all meetings and translate important documents into the parent’s native language.<sup>211</sup> Even when documents are translated, it is not unusual for our clients to wait weeks or even months for a translated copy of a notice to arrive in the mail; often, by that point, the action about which the notice is informing the parent has already taken place. Upon reviewing the file of one of our clients—“Mrs. Delgado,” an immigrant from the Dominican Republic who did not read English—a law student discovered that she had signed three previous IEPs written in English and had never been provided a Spanish translation. Even with legal representation, the school district failed to provide Mrs. Delgado with a Spanish interpreter at the IEP meeting. In this instance, the law student—who was a fluent Spanish-speaker—translated for her client.

Using a non-professional interpreter is not an uncommon practice. With a relatively common language like Spanish, schools will often meet their translation obligation by pulling into the meeting another member of the staff who speaks the parent’s language. With less common languages, the school often relies upon a family member who also speaks English. In “Ms. Alemayehu’s” case, her son’s school had established the practice of calling her teenage daughter out of class to translate from English to Amharic at the young man’s

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211. See 34 C.F.R. § 300.503(c) (2013) (requiring that notices to the parent “must be—(i) Written in language understandable to the general public; and (ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so” and further requiring that “If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure—(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (ii) That the parent understands the content of the notice; and (iii) That there is written evidence that the requirements [above] have been met”). *But see* Rosenbaum, et al., *supra* note 28, at 134 (“[T]he law does not mandate that a child’s educational records and reports are translated into a parent’s native language or made accessible to parents who cannot read or have other communication deficits.”).

IEP meetings, which had an adverse impact on the daughter's education. In all situations where untrained interpreters are used, there is great risk that educational jargon and concepts with legal significance will not be properly communicated to the parent. Many parents do not have access to this kind of informal translation assistance in the first place, and schools frequently do not provide any interpreter services at all—professional or otherwise. When they do, even professional interpreters are often unfamiliar with IDEA jargon. Relatedly, we have also encountered the substantive barriers to designing appropriate services that can arise for students who are English Language Learners when a bilingual educator is not present at the IEP meeting.<sup>212</sup>

Even parents who speak English fluently can experience several disadvantages at an IEP meeting. For example, several authors have noted the informational asymmetries that can exist between parents and school staff.<sup>213</sup> In addition to the general discrepancies that exist between most parents and professional educators—e.g., knowledge of pedagogy, knowledge of legal rights and duties, knowledge of district resources—we have observed several other gaps with which our clients often contend.<sup>214</sup> One is that the school frequently does not provide parents with copies of evaluation reports in advance of the IEP Team meeting, making it difficult for them to prepare for and understand the Team's conversation.<sup>215</sup> One of our clients, "Ms. Lipinski," did not receive advance copies of the school's transition assessments of her 18-year-old son, although her lawyer asked for them in writing six weeks prior to the meeting and reiterated this request the week before the IEP discussion. Mrs. Lipinski and her attorney prevailed on the school to delay the meeting for 10 minutes

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212. Congress has expressed concern about this problem as well and has recommended that bilingual educators be included in the IEP Team meeting for students who are English Language Learners. *See* H.R. REP. 108-77, at 111 (2003).

213. *See, e.g.*, Pasachoff, *supra* note 26, at 1437–40.

214. Congress has also recognized that barriers often get in the way of effective parental participation. *See* H.R. REP. 108-77, at 84 ("Parents should be active participants in their child's education experience. However, often under the current Act, parents of students with disabilities are not fully informed or are often given limited options of where or how their child can be educated.").

215. Some states require schools to make this information available to parents before the meeting. *See, e.g.*, 603 MASS. CODE REGS. 28.04(2)(c) (West, Westlaw through Dec., 2013) (requiring schools to provide summaries of assessments to parents at least two days in advance of the Team meeting *upon request*) (emphasis added); *see also* Wettach & Berlin, *supra* note 190, at 188 (recommending that parents and their advocates request copies of evaluation reports in advance of the meeting).

so they could quickly review the evaluations together in order to participate meaningfully in the ensuing discussion.<sup>216</sup>

Another common occurrence is for school staff to have a “pre-meeting” where they develop a draft IEP that is not shared with the parent prior to the Team Meeting.<sup>217</sup> Finally, even when the parent attempts to balance the information asymmetries by, for example, bringing an independent evaluator to the meeting, school staff retains the advantage that comes with being facilitators of the meeting. “Dr. Lewis,” an independent neuropsychologist who had evaluated Mrs. Delgado’s son (see above), explained that the school limited the duration of the IEP meeting to one hour and listed her last on the agenda. By the time all of the student’s teachers had presented their reports, there were only ten minutes left in the meeting, leaving insufficient time to discuss her evaluation.

In our experience, such barriers to effective participation in the IEP Team meeting itself are compounded by the fact that the imaginations of those making educational recommendations and proposing IEPs are often limited because they either do not have authority to offer certain placements or services or they are not aware of what options exist. Congress has recognized that schools frequently do not follow the provision of the law requiring the presence of a special education administrator who has authority and knowledge of the district’s offerings.<sup>218</sup> Even when such a person

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216. The failure to receive reports before the meeting places parents who have disabilities, such as a processing speed deficit, at particular disadvantage. While not required under IDEA, such parents who inform the school of their disability can request that they be provided with advance copies of reports as an accommodation under Section 504 of the Rehabilitation Act of 1973.

217. Federal IDEA regulations explicitly allow schools to have preliminary discussions about a student to which the parent is not invited. *See* 34 C.F.R. § 300.501(b)(3) (2013) (defining “meetings” in which parents are entitled to participate to *exclude* “informal or unscheduled conversations” among educators and “preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting”). Similarly, schools may develop a draft IEP, but this has been discouraged by the Department of Education because it tends to limit discussion at the eventual Team meeting. The Department recommends that schools share any IEP draft with parents before the Team meeting. *See* 71 Fed. Reg. 46,678 (Aug. 14, 2006). Both the Department of Education and courts have made clear that it is impermissible for schools to complete the final IEP before the meeting takes place. *See id.*; *see also* *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004) (holding that it is illegal for a school to predetermine the student’s services or placement); *Wettach & Berlin, supra* note 190, at 188–89.

218. *See* S. REP. NO. 108–185, at 31 (2003) (“It has come to the attention of the committee that, despite the requirement in IDEA 1997, many IEP meetings are conducted without a member present who is knowledgeable about the availability of

attends, we have participated in many meetings where the discussion is limited only to those programs and services that the individual school or district already has available. This limitation can render the resulting Team meeting more an exercise in pressuring parents to accept some pre-ordained reality than a process of brainstorming earnestly and creatively an education plan designed to unlock a child's potential.<sup>219</sup>

The unfortunate tendency toward myopia is compounded by the fact that the resulting plan, however good or bad, is often not even shared with those individuals—classroom teachers—who are going to be responsible for carrying it out.<sup>220</sup> While the law requires that at least one general and one special education teacher participate in an IEP meeting, the reality in our experience is that teachers are often not provided coverage for their classrooms to attend these meetings. When they do attend it is not uncommon for them to have to return to class after presenting their updates and concerns. Also, in higher grades where students have more than one classroom teacher, we often attend meetings where only one teacher is present. This is not necessarily a teacher from a class in which the student is experiencing particular difficulties. As a result, students' teachers are often unaware of the recommendations contained in expert evaluations and may not even receive a copy of their students' IEPs. This was the case with "Victor," a fifth-grader whose classroom teacher routinely sent him to the office for making rude noises and inappropriate comments during her lessons. An expert evaluation revealed that the cause of Victor's quirky behaviors was a non-verbal learning disability. The expert attended his IEP meeting to explain the complexities of this disability and methods for addressing its

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resources of the local educational agency. Many disagreements arising at IEP meetings could be resolved if this person were in attendance instead of intervening only after a parent has filed a complaint.").

219. While parents have the right to appeal the outcome of an IEP meeting if they disagree with it, the authority to make final decisions at the school level if the Team is not unanimous resides with school officials. *See* Anne Proffit Dupre, *Disability, Deference and the Academic Enterprise*, 32 GA. L. REV. 393, 463 (1998) (approving of school officials' decision-making authority at the IEP meeting on the theory that, when negotiations break down, "managerial discretion becomes the most suitable method of problem solving"); *supra* notes 19–22 and accompanying text (discussing parents' options for resolving disputes).

220. Congress has recognized the important role of the classroom teacher. *See* S. REP. NO. 94-168, at 1457 (1975) ("If the integration of handicapped children into the classroom is to be accomplished, several important changes must take place in that classroom. A most important element is the teacher, who will be responsible for the management of the handicapped children in that classroom.").

behavioral manifestations in the classroom. While Victor's special education resource teacher attended the meeting, his general education teacher did not attend and the school did not provide her with a copy of the new IEP. Without the benefit of the neuropsychologist's tips and suggestions, she continued to rely on the strategy of sending Victor to the office to remedy his behaviors, and Victor remained on the school's "behavior list" due to his large number of referrals.

Institutional failures with respect to parental participation in the IEP process are particularly harmful to students with social, emotional, and behavioral challenges because these are the challenges about which parents and outside providers are most likely to have essential information. For the most part, parents and outside therapists and social workers have less information that is critical to understanding the crux of a learning disability like dyslexia; the educators who are more intimately involved with the student's academic learning are the main repository of such information. With nonacademic challenges that have an adverse impact on a student's education, the information that parents and outside agencies and providers bring to the table has more potential to be transformative for the work of educators in school. Yet, the implementation failures we have highlighted make it less likely that schools—and students—will benefit from the sharing of this information.

The story of "Sara," a middle school student who had been found stealing objects and food from her classmates and hoarding them in her locker, illustrates the great benefit that can result when the IEP Team meeting functions in the constructive way that Congress intended. Rather than holding a suspension hearing, as her school initially proposed to do, her lawyer convinced the principal to convene the IEP Team, to which her parents invited the trauma therapist she was seeing outside of school. Sara's therapist was able to share information about her Reactive Attachment Disorder and Post-Traumatic Stress Disorder, which she had developed as a result of her experiences as an infant in a Chinese orphanage. The therapist explained that, as Sara had recently begun remembering the traumas of the orphanage, she came to feel increasingly unsafe. Her stealing and hoarding behaviors actually stemmed from her early neglect and deprivation; instinctively, she had to be sure that she would never again run out of food. With this new understanding, which the school would never have discovered on its own, Sara's teachers were able to amend her IEP to provide additional counseling and therapeutic supports, rather than addressing her problematic behaviors in counterproductive ways.



### C. Related Services

The IDEA emphasizes the importance of crafting IEPs that are carefully individualized to meet the unique needs of each eligible student.<sup>221</sup> Acknowledging that the educational success of students with disabilities often depends on more than the receipt of specialized instruction from their classroom teachers, the law makes available to students a wide array of “related services” that may be necessary to help them access and make progress in the general curriculum.<sup>222</sup> These services can include psychological counseling, behavioral support, social work services, speech and language therapy, occupational therapy, adaptive physical education, transportation, therapeutic recreation, family therapy, and transition services—essentially any service that is necessary for a student to learn.<sup>223</sup>

#### 1. Key Related Services Provisions

On paper, the related services provisions of the IDEA are a key mechanism for realizing the highly individualized mandate of the law—and they are particularly well-designed to provide students with social, emotional, and behavioral challenges the supports they need to succeed in school and avoid the negative outcomes we have highlighted.<sup>224</sup> The law establishes a theoretically unlimited palette of

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221. See, e.g., 20 U.S.C. § 1400(d)(1)(A) (2012) (declaring that one of the purposes of the statute is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet *their unique needs*”) (emphasis added).

222. The statute explicitly defines free appropriate public education to include “related services” in addition to “special education.” See *id.* § 1401(9).

223. See § 1401(26) (defining related services as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education”); 34 C.F.R. § 300.34 (2013) (providing specific definitions of each of the related services listed in the statute). The IDEA also requires that students be provided with “supplementary aids and services” as necessary, which it defines as “aids, services and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.” § 1401(33). The primary distinction between these two types of services is that related services are those necessary for a student to benefit from *special education*, whereas supplementary aids and services are required to help a child learn in the *regular education classroom*. While this section explicitly focuses on the importance of related services to students with social, emotional, and behavioral challenges, many of the points we raise are also applicable to supplementary aids and services.

224. Many of the students with whom we work also have learning disabilities, developmental delays or intellectual impairments in addition to, or intertwined with, their social, emotional and behavioral challenges. For these students, specialized instruction in either the regular or special education classroom is as critical to

options for schools to choose from as they construct a customized IEP for a student. The regulatory definitions of several categories of related services evidence their breadth and flexibility, as well as their significance for the particular group of students for whom we advocate.

One example is *psychological services*, which can be critical for helping students develop social and self-regulatory skills that enable them to remain in the classroom and benefit from their education.<sup>225</sup> In addition to assessment and direct services, these services are also explicitly defined to include “consulting with other staff members,” “planning and managing a program of psychological services, including psychological counseling for children and parents,” and “assisting in developing positive behavioral intervention strategies.”<sup>226</sup> School *social work services* are similarly expansive, including “group and individual counseling with the child and family,” “working in partnership with parents and others on those problems in a child’s living situation that affect the child’s adjustment in school,” and “mobilizing school and community resources to enable the child to learn as effectively as possible.”<sup>227</sup>

Both of these definitions dispel any notion that related services are only provided directly to eligible students; they recognize that for students to benefit from services, their caregivers, family members

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educational progress as the related services they receive—perhaps more so. While we acknowledge that it is neither possible nor desirable to separate entirely students’ learning needs from their social, emotional, and behavioral needs, our effort here is to shed light on those aspects of the IDEA and its implementation that are particularly relevant to the latter set of needs. We therefore do not address “special education” per se, meaning the specialized academic instruction that usually takes place in the classroom. Other authors have explored the nuances of how academic instruction itself should be modified to meet the needs of learners with social, emotional, and behavioral challenges. See, e.g., COLE ET AL., *supra* note 58 at 61–68; SUSAN E. CRAIG, *REACHING AND TEACHING STUDENTS WHO HURT: STRATEGIES FOR YOUR CLASSROOM* (2008).

225. See *supra* note 4 (explaining how students do not have to be diagnosed with an emotional or behavioral disability in order to qualify for these service). But see KRISTA KUTASH, ET AL., *SCHOOL-BASED MENTAL HEALTH: AN EMPIRICAL GUIDE FOR DECISION-MAKERS* 64 (2006) (noting that fewer than half of students who have emotional disturbances receive appropriate mental health services in schools).

226. 34 C.F.R. § 300.34(c)(10) (2013); see Jean A. Baker et al., *Evidence for Population-Based Perspectives on Children’s Behavioral Adjustment and Needs for Service Delivery in Schools*, 35 SCH. PSYCH. REV. 31, 44 (2006) (arguing that “indirect consultative services to teachers . . . will be increasingly required of school psychologists” and “the ability of school psychologists to serve as school-level consultants . . . will be increasingly important in prevention-oriented models of service delivery”).

227. § 300.34(c)(14).

and often even their classroom teachers need to be receiving training or consultation as well.<sup>228</sup> These definitions also acknowledge the importance of coordinated care by allowing for school personnel to work in partnership with those outside the school—both family members and outside providers—to ensure that adults involved in supporting the child are not working at cross purposes and can reinforce each other’s efforts.<sup>229</sup> This kind of collaboration and coordination is key to the educational success of students with social, emotional and behavioral challenges, who are often served in multiple systems by multiple providers.<sup>230</sup>

Two additional provisions function in tandem with related services and are similarly important for these students. The first of these provisions, *extended school year services*, entitles children who need them to receive related services (as well as special education) during times other than the normal school year, including over the summer, during school vacations, and before or after school.<sup>231</sup> These services

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228. See § 300.34(c)(8) (specifically enumerating as related services parent counseling and training to assist parents in understanding the special needs of their child, provide parents with information about child development, and help parents acquire the necessary skills that will allow them to support implementation of their child’s IEP); see also MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE ch. 8:12 (3d. ed. 2008) (“Applying the IDEA, some courts have required districts to provide training for parents on behavior management techniques as a related service to enable a child to benefit from special education.”) (citing *Chris D. v. Montgomery Cnty. Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990); *Stacey G. v. Pasadena Indep. Sch. Dist.*, 547 F. Supp. 61 (S.D. Tex. 1982), *preliminary injunction vacated on other grounds*, 695 F.2d 949 (5th Cir. 1983)). Some states include a separate section of the IEP to delineate the consultative services provided to parents and teachers by psychologists or other related services providers. See, e.g., *Individualized Education Program*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/sped/iep/forms/pdf/IEP1-8.pdf> (last visited Sept. 23, 2013).

229. See Cannon, *supra* note 87 at 1055–60.

230. See David M. Osher, *Creating Comprehensive and Collaborative Systems*, 11 J. CHILD & FAM. STUD. 91 (2002) (“Children and youth with emotional disturbance and their families receive and/or require services from multiple agencies and multiple service systems.”). Osher discusses the way in which fragmentation among multiple providers can be frustrating both to parents and to the providers. See *id.* at 92; see also KUTASH, ET AL., *supra* note 225, at 65 (“[T]hroughout IDEA [and other federal initiatives] there are references to schools and community health agencies collaborating to develop effective [school-based mental health] services, but little direction is offered on what this should look like, and how it is to be accomplished.”).

231. See 34 C.F.R. § 300.106 (2013). Regulations require that extended school year services be provided if a child’s IEP Team determines that such services are necessary for the student to receive FAPE. States have adopted various standards to guide IEP Teams’ determinations about extended school year services; some require evidence that regression of skills is likely without such services and others require that a student be at a critical stage of developing an emerging skill and that

are critical for many children with social, emotional and behavioral challenges, who need ongoing opportunities for routine practice of the social and self-regulatory skills their educators and related service providers work to help them develop during the normal school day and year. Further, many of these students need help generalizing their skills to other settings, like home and the community, that are outside the safety and structure of the classroom environment.<sup>232</sup> By ensuring that students learn how to access their skills beyond the confines of the typical school day, extended school year services can be critically important for helping students avoid entanglement with poor outcomes both in and outside of school.

The second provision, *transition services*, requires IEP Teams to provide students with the supports they need to prepare for post-school activities, such as post-secondary education, employment, independent living and community participation.<sup>233</sup> These services must be designed to help students reach measurable postsecondary goals that are based on the administration of age-appropriate transition assessments and that are included in their IEPs.<sup>234</sup> Transition services can include related services, and are also defined to include “instruction, . . . community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”<sup>235</sup> All eligible students’ IEPs must contain postsecondary goals and necessary transition services beginning with the IEP that will be in effect when the student turns sixteen, or earlier if the Team determines it is necessary.<sup>236</sup> Many of our older students become disengaged with school, increasing the risk of poor outcomes, precisely because they do not feel it is adequately preparing them for their transition to adulthood. The entitlement to transition services is critical for these students because it requires that their voices be

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interruption of services would undermine development of the skill. *See* Wettach & Berlin, *supra* note 190, at 183. On the development of the legal standard for extended year services, *see* WEBER, *supra* note 228, ch. 3:18.

232. *See In re. Dracut Pub. Sch.*, BSEA No. 08-5330 (Commw. Mass. Div. Admin. L. App. Special Educ. Apps. Mar. 13, 2009).

233. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (2012).

234. *Id.*

235. *Id.* § 1401(34). As with other related services provisions discussed above, transition services have been interpreted very broadly by judges and hearing officers to encapsulate far more than just mastery of the traditional academic curriculum. For a general discussion of transition services, *see* Wettach and Berlin *supra* note 190, at 181–83.

236. *See supra* note 192 and accompanying text.

included in setting postsecondary goals<sup>237</sup> and it obligates their educators to help them master not only the academic content that is necessary to navigate adult life but also to improve the social, emotional and behavioral skills with which they struggle.<sup>238</sup>

## 2. *Implementation Failures of Related Services Provisions*

Despite the notable breadth of the IDEA's related services definition, we frequently encounter schools that proceed as if limited by a small menu of standard options and/or by the schedules of providers.<sup>239</sup> This narrow view of related services often keeps them from being appropriately tailored to the student's unique needs and undermines their effectiveness. "Julian," for example, had a severe articulation disability that made it hard for both his teacher and his classmates to understand him. His attendant difficulty forming relationships contributed to Julian's dysregulation in the classroom and his frequent use of behaviors rather than words to get his needs met. An experienced speech and language pathologist evaluated Julian and determined that he would need daily speech therapy to overcome his speech impediment. Because the district's speech therapist travelled between schools and was only in Julian's school two days a week, he only received two weekly sessions of speech

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237. IDEA regulations require that the eligible student must be invited to any meeting where postsecondary goals will be discussed and that, if the student does not attend, the district must take other steps to ensure that his or her preferences and interests are considered. See 34 C.F.R. § 300.321(b) (2013).

238. See, e.g., *In re. Dracut Pub. Sch.*, BSEA No. 08-5330 (Commw. Mass. Div. Admin. L. App. Special Educ. Apps. Mar. 13, 2009). (ordering school district to provide student with pragmatic language instruction, development of organizational skills, vocational training, travel instruction and a comprehensive transition assessment, delivered as part of two years of extended IDEA eligibility, even though he had made effective academic progress and had earned the academic credits required for a diploma); see also, SPECIAL ED. ADVOC. UNDER IDEA, *supra* note 115 (discussing transition services generally in the context of advocacy for students in the delinquency system).

239. See Martha L. Minow, *Update on Implementation of IDEA: Early Returns from State Studies*, NAT'L CTR. ON ACCESSING GEN. CURRICULUM, [http://aim.cast.org/learn/historyarchive/backgroundpapers/ncac\\_update\\_idea\\_implementation#.UkDzU1Mpc1I](http://aim.cast.org/learn/historyarchive/backgroundpapers/ncac_update_idea_implementation#.UkDzU1Mpc1I) (last updated Oct. 22, 2013) ("Related services, notably psychological and social work services, are often in short supply and professionals are diverted to crisis work and evaluations rather than preventive and supportive work."); see also Heather L. Crisp, et al., *Transporting Evidence-Based Therapy for Adolescent Depression to the School Setting*, 29 EDUC. & TREATMENT CHILD. 287, 304 (2006) (noting that counselors and mental health providers in schools "carry many responsibilities including scheduling, academic advising, as well as administrative tasks which occupy a large portion of their time and constrain their opportunities to learn and implement evidence-based interventions").

therapy in his IEP, and his progress—academically and socially—stalled.

Schools also frequently make the mistake of assuming that school-based psychological counseling is the primary, if not the only, related service need of students with social, emotional and behavioral difficulties. While counseling is certainly important for many of our students, the skills associated with other services can be just as integral to making social and emotional progress. When “Carla’s” outpatient therapist attended her Team meeting to advocate that she receive increased occupational therapy,<sup>240</sup> for example, the school argued that she did not need these services any longer because her handwriting had improved and she had learned to zip and unzip her jacket. Carla’s therapist explained that in the community-based clinic she was receiving a special kind of occupational therapy—sensory integration therapy<sup>241</sup>—that was about more than just pencil grasp and visual motor integration. Engaging in this therapy in the clinic helped Carla’s brain better process information and increased her ability to use language to discuss her emotions, greatly improving the efficacy of her psychological counseling. Notwithstanding this explanation, and the willingness of an outside expert to train Carla’s school in sensory integration techniques, the school personnel on her Team failed to see the relevance of this kind of service to her social-emotional disability and eliminated occupational therapy from her IEP rather than increasing it. As was true with Julian’s speech language therapy, Carla’s occupational therapy was a key to unlocking her social and emotional progress even though it was not administered by a school psychologist or guidance counselor.

Another typical shortcoming is that schools often confine themselves to delivering related services according to a “pull-out” model, where the student is removed from the classroom and sent down the hall to meet individually with a professional for some given number of sessions per week.<sup>242</sup> Using this model exclusively is not

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240. See 34 C.F.R. § 300.34(c)(6) (2013) (defining occupational therapy as services for “improving, developing or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function”).

241. For a description of sensory integration therapy and a definition of sensory integrative disorders, see generally JEAN AYERS, *SENSORY INTEGRATION AND THE CHILD: UNDERSTANDING HIDDEN SENSORY CHALLENGES* (2005).

242. See Baker et al., *supra* note 226, at 44 (supporting “complimentary movements within school psychology and allied disciplines that are focused on service delivery within the general education [classroom]” and noting that the

optimal for many of the students with whom we work. Our students often lack the skills to manage their emotions, calm their anxieties, and handle difficult social situations in the context of their classrooms and communities. This difficulty is one of the major reasons they run afoul of the school discipline and juvenile delinquency systems. While some amount of one-on-one support is often necessary for these students, especially initially, they also typically need support to generalize the skills they learn in the counselor's office to a real-world context.<sup>243</sup> Where appropriate, and with proper training of related service providers and teachers on effective delivery of "push-in" services, related services can be delivered in a small group format or directly in the more natural, inclusive setting of the general classroom.<sup>244</sup>

Additionally, a key factor in helping students to be successful both in and out of school is consistency. Often, the related services that students receive in school are not designed in a way that promotes consistency across the school, home and the community.<sup>245</sup> Teams often do not include consultative services to parents and classroom teachers in students' IEPs, making it difficult for other adults to reinforce approaches employed by related services providers.<sup>246</sup> For example, to help manage his anxiety, "Jorge's" school social worker created "social stories" that included pictures of activities his first grade class would be doing the following week. These stories would

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"number of students and the variability in students' needs in general education classrooms overwhelm the capacity of resource-type service delivery models").

243. See SUSAN COLE ET AL., CREATING AND ADVOCATING FOR TRAUMA-SENSITIVE SCHOOLS 9 (2013) *available at* <http://traumasensitiveschools.org/wp-content/uploads/2013/11/HTCL-Vol-2-Creating-and-Advocating-for-TSS.pdf>.

244. An overreliance on "pull-out" services can also offend the Least Restrictive Environment presumption of the IDEA. See 20 U.S.C. § 1412(a)(5) (2012) (requiring that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled"). While there is no requirement that related services be delivered in the classroom, there is a strong argument that doing so could be required by the LRE presumption if it enables a student to spend more time learning with regular education peers. On the relationship between related services and LRE, see generally WEBER, *supra* note 228, ch. 8:3.

245. One study of an effective school-based mental health services model attributed part of the model's success to the "concurrent use of school-based and home-based services," which allowed for "continuity of services when either teachers or parents were unavailable to staff." Marc S. Atkins et al., *School-Based Mental Health Services for Children Living in High Poverty Urban Communities*, 33 ADM. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERV. RES. 146, 154 (2006).

246. See *id.* at 155 (noting that providing "consultation to teachers is especially daunting in high-poverty urban schools, given the deteriorating conditions, the high levels of staff stress, and the enormous obstacles to daily living experienced by children and families").

help him visualize what was coming up and reduce his nervousness. However, because the social worker did not train his mother in how to use the social stories at home, they remained in his backpack and his anxiety continued. In-home behavioral supports can also be included in students' IEPs to help solidify newly acquired behavior management skills by reinforcing them in all settings. Similarly, though, schools often do not provide these services.

Finally, although the IEP Team meeting can and should be used as a forum for including a student's outpatient service providers in the planning process—such as when Sarah's therapist helped her teachers understand how Reactive Attachment Disorder explained her stealing and hoarding<sup>247</sup>—this coordination often does not happen effectively.<sup>248</sup> As a result, it is much harder to ensure that the related services provided to a student in school are coordinated and mutually reinforcing with services that he or she is receiving in other settings.

The story of one fifteen-year-old student—"Randy"—illustrates particularly well the value of related services to success both in school and beyond when implemented according to the law. As was true of his father, "Charlie," Randy had a genetic degenerative eye disease called *retinitis pigmentosa*. This disease causes one to gradually lose his peripheral vision until it feels as though he is looking through a very small pinhole. Randy also experienced depression and anxiety stemming from traumatic experiences in his family, and he had a language-based learning disability. Though ophthalmological tests showed that Randy's vision had only begun to deteriorate slightly, he was acutely aware of how his vision would become impaired in the future because of his father's experience with the same disability. Randy's anxiety and depression were intensified because of his fears about losing his sight, and he had begun self-medicating with marijuana as a maladaptive coping strategy for managing his stress.

Randy's school had determined that he did not need vision services in his IEP because he still had fairly good vision, but his lawyers were able to explain the degenerative nature of the disease and why he needed services now to help him *prepare* for a future with greatly reduced eyesight. He needed to learn new strategies for reading, build his keyboarding skills, learn skills for navigating the city, and learn how to identify and access services in the community. Because

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247. *See supra* Part II.B.

248. *See* Thomas R. Kratochwill, et al., *School-Based Interventions*, 13 CHILD ADOLESCENT PSYCH. CLINICS N. AM. 885, 885 (2004) (noting that "schools traditionally have not been organized in ways that promote collaboration among professionals in a teaming context").



he was fifteen years old Randy also needed transition support to plan for how his deteriorating eyesight would affect his employment after graduation. When the school finally provided him with services from a vision specialist to work on all of these things, his anxiety and depression—and resulting emotional and behavioral challenges—diminished significantly because he felt more in control of his education and his life. Related services—even those such as vision services, which may not be explicitly designed to address emotional and behavioral goals—can nonetheless improve students' functioning in these areas if they help students make educational progress and feel a greater sense of mastery over their environment.

#### D. Behavior-Related Provisions

Historically, students with special needs, particularly students with emotional and behavioral challenges, have been more likely to be excluded from the classroom than students without disabilities.<sup>249</sup> These same students were also among the most poorly served of disabled students.<sup>250</sup> These inequities, along with several successful lawsuits, prompted Congress to respond by designing the IDEA to require educational opportunities to all disabled children and to provide necessary procedural safeguards to ensure that students with disabilities would not be unjustly funneled out of the school system.<sup>251</sup> Perhaps the most significant and beneficial changes affecting children with behavioral and emotional difficulties came about in the 1997 amendments to the IDEA with the inclusion of concepts such as manifestation determination review, positive behavior interventions and support, and functional behavioral assessments.<sup>252</sup> In the wake of *Honig v. Doe*,<sup>253</sup> a case in which the Court interpreted the IDEA as denying schools the unilateral authority they had previously been exercising to remove students with disabilities for behavioral reasons,

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249. SKIBA ET AL., *supra* note 46, at 62–64.

250. Lucy Shum, *Educationally Related Mental Health Services for Children with Serious Emotional Disturbance: Addressing Barriers to Access Through the IDEA*, 5 J. HEALTH CARE L. & POL'Y 233, 235 (2002). Shum notes that the United States District Court for the Eastern District of Pennsylvania entered a consent decree in *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), stating that the denial of educational services to children with mental retardation violated the Equal Protection Clause. *Id.* Shum also discusses *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), in which the court found that students with disabilities were being excluded from educational opportunities for issues related to behavior, among other things. *Id.*

251. *See id.* at 235.

252. *See* BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57.

253. 484 U.S. 305 (1988).

Congress introduced new discipline related provisions in the 1997 Amendments.<sup>254</sup> It gave school officials the power to remove students without regard to their disabilities for certain dangerous behaviors—guns, drugs, assault—but also included critical new provisions designed to ensure that for less dangerous behaviors, eligible students would not be excluded from school for behaviors that are related to their disabilities.<sup>255</sup>

By enacting these protections, Congress was attempting to redress a long history of exclusion and misidentification of students with disabilities, especially minority students.<sup>256</sup> Congress recognized that prevention of and early intervention for misbehavior are critical to student success because the alternative outcomes are untenable.<sup>257</sup>

### 1. Key Behavior-Related Provisions

The poor outcomes we have reviewed above led Congress to require evidence-based practices such as “positive behavioral interventions and supports” and “functional behavioral assessments” to address behavioral challenges of children with special needs.<sup>258</sup> As a demonstration of its commitment to both of these strategies, Congress increased funding to ensure their use in schools.<sup>259</sup> Congress also wanted to equip teachers with the necessary training, such as training on how to implement behavioral interventions and how to deal with behavior problems.<sup>260</sup>

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254. *See id.* at 323 (“Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”).

255. *See* 20 U.S.C. § 1415(k) (2012).

256. *See* HEIDI VON RAVENBERG & TARY J. TOBIN, IDEA 2004: FINAL REGULATIONS AND THE REAUTHORIZED FUNCTIONAL BEHAVIORAL ASSESSMENT 6 (2008); *see also* H.R. REP. NO. 108-77 at 84 (2003) (noting that a disproportionate number of minority students are wrongly placed in special education rather than being provided positive behavioral interventions and supports and intensive educational interventions).

African-American students are labeled as mentally retarded and emotionally disturbed far out of proportion to their share of the student population. For minority students, misclassification or inappropriate placement in special education programs can have significant adverse consequences, particularly when these students are being removed from regular education settings and denied access to the core curriculum.

H.R. REP. NO. 108-77 at 84.

257. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 6.

258. *Id.* at 6–7.

259. *See* H.R. REP. NO. 105-95, at 118 (1997).

260. *See id.*

The IDEA now contains several concrete steps that must be taken to prevent schools from unilaterally removing children with disabilities from the classroom for non-dangerous disciplinary infractions.<sup>261</sup> When each of these steps is faithfully implemented, students with behavioral challenges will be more appropriately served and less frequently excluded from the school setting, thus lessening the likelihood of poor outcomes.

First, the law requires that when a school proposes any disciplinary action that would result in a child's exclusion for disciplinary reasons for more than ten days in a given school year, the school must hold a manifestation determination review to determine whether there is a relationship between the child's disability and the misbehavior.<sup>262</sup> At this meeting, with the proper Team members present,<sup>263</sup> a discussion must take place to review the relevant information in the child's file, the IEP, teacher observations, and any other relevant information provided by the parent.<sup>264</sup> After reviewing the information presented, the sole purpose of the manifestation determination review is to decide whether the conduct was caused by or had a direct and

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261. See Julie K. Waterstone & Jane Wettach, *School Discipline and Students with Special Needs*, in SPECIAL EDUCATION ADVOCACY, *supra* note 52, at 239, 240.

262. See 20 U.S.C. §1415(k)(1)(E) (2012). In defining the disciplinary action that gives rise to this requirement, the statute does not specifically reference suspension or expulsion; rather, the statute uses the term "change in placement." Although not defined in the statute, the federal regulations define "change in placement" as a removal of a child with a disability from the current educational placement for more than ten consecutive school days or a series of removals that "constitute a pattern." 34 C.F.R. § 300.536 (2013). A pattern occurs when the series of removals total more than ten days in a school year, the child's behavior is substantially similar in each incident, and "such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another." 34 C.F.R. § 300.536(a)(2); see also Waterstone & Wettach, *supra* note 261, at 241. We have seen a number of students with disabilities get routinely suspended for short periods of time that total more than ten days, and schools fail to hold a manifestation determination review as required by law. These series of short suspensions are very disruptive and harmful to the student in the same way that a longer term suspension would be.

263. The Team members include the child's parent(s), a representative of the school district and "relevant members of the IEP Team." See 20 U.S.C. § 1415(k)(1)(E). Neither the statute nor the regulations define which members of the Team are "relevant" for purposed of a manifestation determination review. For general definition of members of the IEP Team, see *supra* note 195. Ideally, there will be people present who can help the Team understand the nature of the disability and how the disability manifests itself in the particular child. Typically, for students with social, emotional, and behavioral challenges, this group should include the child's therapist, social worker, or some other mental health professional who has worked closely with the child. See also, Waterstone & Wettach, *supra* note 261, at 240.

264. See *e.g.*, 20 U.S.C. § 1415 (k)(1)(e)(i); 34 C.F.R. § 300.530(e)(1) (2013).

substantial relationship to the disability, or whether the conduct was a direct result of the school's failure to implement the IEP.<sup>265</sup> If the Team decides that the conduct *is* a manifestation of the disability, then the child must be returned to the placement from which he or she was removed.<sup>266</sup> If the Team finds that the conduct was a manifestation of the disability because the local education agency had failed to implement the IEP, then the local education agency must take immediate steps to remedy the deficiencies.<sup>267</sup> Regardless of the reason, if the Team concludes that the conduct was a manifestation of the disability, the IEP team must either conduct a Functional Behavioral Assessment and implement a behavior plan or review and modify, if necessary, a behavior plan already in existence.<sup>268</sup>

If the team determines that the conduct was *not* a manifestation of the child's disability, the exclusion from school may be imposed as though the child were not disabled.<sup>269</sup> In such circumstances, the child is still entitled to receive a free appropriate public education.<sup>270</sup> Irrespective of the Team's finding, the manifestation determination review is an opportunity for Team members to ensure that the student is receiving the appropriate supports to reduce inappropriate behaviors, including revising the IEP as needed.<sup>271</sup>

The next step in the proactive approach to quelling behaviors that interfere with learning is to ensure that a proper functional behavioral assessment (FBA) is conducted.<sup>272</sup> The FBA is an established

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265. See 20 U.S.C. § 1415(k)(1)(E).

266. See § 1415(k)(1)(F)(iii).

267. See 34 C.F.R. § 300.530(e)(3).

268. See, Waterstone & Wettach, *supra* note 261, at 248.

269. See *e.g.*, 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).

270. See 20 U.S.C. § 1415(k)(1)(D). The statute requires that the student continue to receive services "as provided in section 1412(a)(1)," which is the section of the IDEA that delineates the requirement to provide a free appropriate public education. Arguably, this provision suggests that the services the excluded student is entitled to receive are robust, in that they should approximate very closely the services contained in the IEP (which ostensibly constitutes the child's FAPE). See 34 C.F.R. § 300.530(d)(1)(i). For students excluded under the "pattern" provision, the Team will determine the services to be provided. *Id.* § 300.530(d)(5). But for students who are excluded for more than ten cumulative days that do not constitute a pattern, a school official "in consultation with at least one of the child's teachers" will determine "the extent to which services are needed," which seems to allow for the possibility that some of these students will not receive services. *Id.* § 300.530(d)(4).

271. See 20 U.S.C. § 1414(d)(3)(B)(i) (2012) ("The IEP Team shall in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.").

272. 20 U.S.C. § 1415(k)(1)(D); see also BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 12 ("As hearing officers have concluded, FBAs are an

methodology for understanding problematic behavior by collecting specific data on aspects of the targeted behavior such as the setting in which it occurs, antecedent or triggering events, and previous consequences that have reinforced the behavior.<sup>273</sup> This assessment allows the Team to understand the reasons that might be underlying problematic behaviors and to develop proactive strategies to address those behaviors that interfere with academic instruction.<sup>274</sup> While there is no clear definition of the essential components of an FBA under the federal statute or regulations, many state laws provide detailed definitions and guidance on its purpose and application.<sup>275</sup> One report found that, upon surveying hearing officer decisions, a proper functional behavioral assessment must be based on more than a mere review of the student's file, demonstrate an understanding of

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essential precursor for an IEP to properly address behavioral issues. OSEP apparently agrees, encouraging districts to take 'prompt steps to address misconduct when it first appears' by conducting an FBA . . .") (citing Thorpe Area Sch. Dist. (PA), 29 IDELR 320 (1998); Birmingham Pub. Sch. (MI), 29 IDELR 765 (1998); OSEP Memorandum, 26 IDELR 981 (Sept. 19, 1997)).

273. See Waterstone & Wettach, *supra* note 261, at 251–52. Neither the statute nor the regulations define who should conduct the functional behavioral assessment. According to Waterstone and Wettach, multiple professionals should be involved in the process. "Many school districts have behavior specialists on staff who are trained in collecting and analyzing behavior data and developing interventions." *Id.* at 252. In the report published by Bazelon Center on Mental Health Law, only two cases were found that discuss who is qualified to conduct a functional behavioral assessment, but admittedly they do not provide much guidance about the required qualification. See BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 12–13.

274. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 8.

275. See VON RAVENBERG & TOBIN, *supra* note 256, at 16. For example, New York defines an FBA as the "process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2005). New York also defines the functional behavioral assessment as including, but not limited to,

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.

*Id.* Illinois describes the FBA as an "assessment process for gathering information regarding the target behavior, its antecedents and consequences, controlling variables, the student's strengths, and the communicative and functional intent of the behavior, for use in developing behavioral interventions." ILL. ADMIN. CODE tit. 23, § 226.75 (2006). For further background, see J.A. Miller, et al., *Functional Behavioral Assessment: The Link Between Problem Behavior and Effective Intervention in Schools*, CURRENT ISSUES IN EDUC. (Nov. 1998), <http://cie.asu.edu/volume1/number5> (noting that there is no current federal legislative definition of an FBA).

the causes of the child's behavior, conduct observations in the student's typical setting, and reflect professional standards.<sup>276</sup>

To illustrate, recall Anthony's story that begins this Article. Anthony's advocate requested that he be evaluated in all areas of suspected disability, which included an FBA. In conducting the assessment, a behavior specialist<sup>277</sup> observed Anthony in the school setting for a period of one week. She observed him in class, in the yard, eating lunch, and interacting with teachers, staff and peers. The behavior specialist recorded each instance of his problem behaviors (throwing objects, fighting with students, talking back to teachers and staff). She identified triggers to those behaviors. She identified interventions that were attempted and noted those interventions that were effective and those that were not. The behaviorist then wrote a report for the Team, which detailed her findings and also included steps that his teachers should take to prevent the behaviors from being triggered and how to address the behaviors proactively as soon as they began. This assessment provided extremely helpful information to the Team, which enabled the educators to address his behavior problems appropriately and gave them the necessary tools to write an effective behavior intervention plan, as explained below.<sup>278</sup>

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276. See BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 8–11.

277. FBAs should be carried out by interdisciplinary teams made up of various school and related personnel. The teams typically include a regular education teacher, a special education teacher, a school psychologist, an administrator, and other school personnel. The members will vary from school to school, but are typically chosen based on their familiarity with special education procedures, child development and behavioral modification techniques. See Jose A. Villalba & Maryann Latus, *School Counselor's Knowledge of Functional Behavioral Assessments*, 30 BEHAV. DISORDERS 450, 450 (2005). Although school counselors are likely members of a FBA team, a survey of school counselors revealed that most are not familiar with FBA and behavior intervention plan procedures. See *id.*

278. While an FBA will be helpful for understanding the behavior of many students like Anthony, there are also students for whom this methodology may be less helpful. The FBA grows out of a "behaviorist" orientation, which suggests that appropriately manipulating the "antecedent-behavior-consequence" trajectory is the way to produce desired behavior outcomes in children. Some authors have noted, however, that for students with primarily *emotionally-based* or *anxiety-based* behavior problems that stem from traumatic experiences, a relational approach that "focus[es] on a safe and predictable learning environment," and that "build[s] on the connection between the teacher or school counselor and the student" is preferable to a purely behavioral approach. COLE ET AL., *supra* note 243 at 114–15. For students with traumatic backgrounds, behavioral antecedents, or "triggers," may be internal and difficult for educators to observe or discover. See COLE ET AL., *supra* note 58, at 64 (noting that a behaviorist who is observing a traumatized child in the classroom "may benefit greatly from working with [a] trauma-sensitive clinician[] to identify what may be triggering a traumatized child's problematic behavior"). In addition, because these children often have more difficulty understanding cause-and-effect

Once the FBA is conducted, the Team must develop an effective behavior intervention plan to implement its findings in the FBA.<sup>279</sup> A behavior intervention plan is a plan of interventions to reduce or eliminate the unwanted behavior of the student.<sup>280</sup> While neither the statute nor the regulations provides specific requirements for a behavior intervention plan, the Office of Special Education Programs in the U.S. Department of Education has stated that it “should include positive strategies, programs or curricular modifications, and supplementary aids and supports required to address the behaviors of concern. It is helpful to use the data collected during the FBA to develop the plan and to determine the discrepancy between the child’s actual and expected behavior.”<sup>281</sup> The plan should contain

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relationships, the use of positive or negative consequences for behaviors may prove ineffective. See e.g., Bruce Perry, *Neurodevelopmental Impact of Violence in Childhood*, in PRINCIPLES AND PRACTICE OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY, 191–203, 200 (D.H. Schetky and E.P. Benedek eds., 2002) (“The threatened child is not thinking (nor should she think) about months from now. This has profound implications for understanding the cognition of the traumatized child. Immediate reward is most reinforcing. Delayed gratification is impossible. Consequences of behavior become almost inconceivable to the threatened child.”); Susan Craig, *The Educational Needs of Children Living in Violence*, PHI DELTA KAPPAN, Sept. 1992, at 67, 68. (noting traumatized children’s “resistance to behavior management techniques that assume an understanding of cause and effect”).

279. See Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011) (citing H. Rutherford Turnbull, III et al., *Public Policy Foundations for Positive Behavioral Interventions, Strategies, and Supports*, 2 J. POSITIVE BEHAV. INTERVENTIONS 218 (2000)).

280. See Waterstone & Wettach, *supra* note 261, at 252.

281. See BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 57, at 14 (citation omitted). OSEP also stated that,

Intervention plans that emphasize skills needed by the student to behave in a more appropriate manner and that provide proper motivation will be more effective than plans that simply control behavior. Interventions based on control often only suppress the behavior, resulting in a child manifesting unaddressed needs in alternative, inappropriate ways. Positive plans for behavioral intervention, on the other hand, will address both the source of the problem and the problem itself and foster the expression of needs in appropriate ways.

*Id.* (citation omitted); see *id.* at 27 n.59 (citing OSEP Memorandum, 26 IDELR 981 (Sept. 19, 1997) (“OSEP encourages districts to take ‘prompt steps to address misconduct when it first appears’ by conducting an FBA and determining the appropriateness of the student’s current [behavior intervention plan].”). Cole et al. echo OSEP’s concern about plans that seek to “control” behavior. They note the particular ineffectiveness of this approach for traumatized children, who

sometimes come from home environments in which power is exercised arbitrarily and absolutely. It is important for these children to learn to differentiate between rules and discipline methods that are abusive and those that are in their best interest. Whenever possible, school personnel

strategies to teach the student replacement behaviors.<sup>282</sup> While consequences can be a part of the behavior intervention plan, they should not be the focus nor should referral to the juvenile justice system be a plausible option.<sup>283</sup>

The law recognizes the importance of using *positive* behavioral interventions and supports to eliminate negative behaviors.<sup>284</sup> The core components of positive behavioral interventions and supports are: behavioral expectations that are defined and taught; *a reward system for appropriate behavior*; a continuum of consequences for problem behavior; and continuous collection and use of data for decision-making.<sup>285</sup> The focus is on encouraging appropriate behavior and rewarding and providing incentives for that behavior rather than punishing negative behavior outright—the notion of “catching students being good.” In fact, the only approach to addressing behavior that is mentioned in the IDEA is positive behavioral interventions and support.<sup>286</sup> Congress encouraged the use of these strategies as a result of the historic exclusion of children with disabilities based on unaddressed behavior<sup>287</sup> and the strong evidence

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should avoid battles for control, seeking instead to engage the child while reinforcing the message that school is not a violent place.

COLE ET AL., *supra* note 58, at 69.

282. See Waterstone & Wettach, *supra* note 261, at 252.

283. See *id.*

284. See e.g., 20 U.S.C. § 1414 (d)(3)(b)(i) (2012) (requiring the IEP Team, “in the case of a child whose behavior impedes the child’s learning or that of others, [to] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior”); 34 C.F.R. § 300.324(a)(2)(i) (2013).

285. See *Is School-Wide Positive Behavior Support an Evidence-Based Practice?*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS (Mar. 2009), <http://www.pbis.org/research/default.aspx>.

286. Congress was hesitant, however, to prescribe any one educational method to schools and instead requires several interventions that allow individual states to govern their own school systems. *Id.*

287. The original Education for All Handicapped Children Act now known as the IDEA, grew out of the *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass’n of Retarded Citizens (PARC) v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), cases. *PL 94-142: Policy, Evolution, and Landscape Shift*, FREE LIBR., <http://www.thefreelibrary.com/PL+94-142%3A+policy,+evolution,+and+landscape+shift.-a0173465140> (last visited Dec. 8, 2013). In *Mills* and *PARC*, the lower courts approved consent decrees that provided procedural protections for parents of children with disabilities and mandated the end of the exclusionary practices that would prevent children with disabilities from being educated in a regular classroom environment. The consent decrees were codified in the Education for All Handicapped Children Act. See Ruth Colker, *Introduction to SPECIAL EDUCATION ADVOCACY*, *supra* note 52, at 2; see also *Positive Behavioral Supports and the Law*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, [http://www.pbis.org/school/pbis\\_and\\_the\\_law/default.aspx](http://www.pbis.org/school/pbis_and_the_law/default.aspx) (last visited



that confirms the effectiveness of positive behavior interventions and supports.<sup>288</sup>

Children respond better to positive behavioral support than they do to punitive measures.<sup>289</sup> Positive behavior supports can include a reward system or different ways that a child responds to praise, and can be implemented both school-wide and in an individualized way through a behavior intervention plan.<sup>290</sup> The school can implement strategies that help a child de-escalate when involved in a difficult situation. A school can utilize a variety of services and interventions like wrap-around services, school-based social work services,<sup>291</sup> family or individual counseling,<sup>292</sup> or even an alternative type of therapy such as therapeutic recreation.<sup>293</sup> The goal should be to teach the child to self-monitor her behavior so that eventually no behavior intervention plan would be necessary.

## 2. *Implementation Failures of Behavior-Related Provisions*

Despite the robust protections offered under the IDEA, many children are not granted a proper manifestation determination review, do not have behavioral supports included in their IEPs, have never received a FBA—and if they do, the assessments we have seen

Dec. 18, 2013) (explaining that Congress relied on the *Mills* decision, where the Court found that students with disabilities were being excluded from educational opportunities for issues related to behavior, among other things, and on the decision of *Honig v. Doe*, 484 U.S. 305, 323 (1988)).

288. *See Positive Behavioral Supports and the Law*, *supra* note 287 (“In amending the [IDEA] both in 1997 and in 2004, Congress explicitly recognized the potential of PBIS to prevent exclusion and improve educational results in 20 U.S.C. § 1401(c)(5)(F): ‘Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.’”).

289. *See* DANIEL J. LOSEN, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 10 (2011), *available at* <http://nepc.colorado.edu/files/NEPC-SchoolDiscipline.pdf>.

290. *See Is School-Wide Positive Behavior Support an Evidence-Based Practice?*, *supra* note 285.

291. *See* Shum, *supra* note 250, at 248. (“Social work services in schools can include ‘[p]reparing a social or developmental history’ of the disabled child ‘[g]roup and individual counseling with the child and family.’” (quoting 34 C.F.R. § 300.24(b)(13)(i)(1997), 34 C.F.R. § 300.24(b)(13)(ii)(1997))).

292. *See id.* (“Counseling services include those ‘provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.’” (quoting 34 C.F.R. § 300.24(b)(2)(1997))).

293. *See* Miller et al., *supra* note 275.

are typically not very thorough and do not yield useful information—or do not have an appropriate behavior intervention plan. Instead, the frequent responses of school administrators to problematic behavior are to suspend repeatedly without a manifestation determination review, informally suspend a student without documenting this action in the student's file, conduct an inadequate manifestation determination review, or involve the police or the school resource officer (SRO).<sup>294</sup> Regardless of whether the student's behavior can be ameliorated by behavioral interventions at school, these approaches circumvent the IDEA's requisite protections, denying the classroom time needed to make effective academic progress. Calling the police or SRO can lead the student to unnecessary court involvement and the undesired outcome of being labeled a juvenile delinquent.

Consider “George,” a sixteen-year-old boy, who was diagnosed with depression and psychosis and who qualified for special education under the emotional disturbance category.<sup>295</sup> George was in the foster care system and had lived in sixteen different placements since the age of two.<sup>296</sup> He had been hospitalized eight times for suicidal

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294. See AARON KUPCHIK, *HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR* 14 (2010) (defining a school resource officer as “a sworn, armed, uniformed police officer placed in a public school”).

295. For the definition of emotional disturbance, see *supra* note 4.

296. Like George, many of our clients are also in the foster care system. The special education system overlaps greatly with the child welfare system as there are a large percentage of children in foster care who receive special education services. See generally Donald W. Ball, et al., *School-Related Problems of Special Education Foster-Care Students With Emotional or Behavioral Disorders: A Comparison To Other Groups*, 4 J. EMOTIONAL & BEHAV. DISORDERS 30 (1996). There is a high correlation between disability, special education, and foster care. See Jennifer N. Rosen Valverde, *Child Welfare and Special Education*, in SPECIAL EDUCATION ADVOCACY, *supra* note 52, at 284. Fifty to sixty percent of children in foster care have developmental disabilities or delays whereas only ten percent of the general pediatric population has these same disabilities or delays. *Id.* (citing Paula K. Jaudes & Linda Diamond Shapiro, *Child Abuse and Developmental Disabilities*, in YOUNG CHILDREN IN FOSTER CARE 213 (Judith Ann Silver et al. eds., 1999)). Forty to eighty-five percent of children in foster care have mental health disorders. *Id.* (citing Lisette Austin, *Mental Health Needs of Youth in Foster Care: Challenges and Strategies*, 20 CONNECTION 6 (2004)). Furthermore, children in foster care are three times more likely to be referred for special education services and as many as forty percent do receive special education services. *Id.* (citing ELISABETH YU ET AL., CHILD WELFARE LEAGUE OF AMERICA, IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH IN CARE: SYMPOSIUM SUMMARY REPORT (2002)). There is research that suggests that there is a significant number of foster youth who exhibit behavioral problems as a result of placement instability and entry into care and who receive special education services despite the fact that they do not necessarily need them. See CONG. COAL. ON ADOPTION INST., 2011 FOSTER YOUTH INTERNSHIP REPORT, THE FUTURE OF FOSTER CARE: A REVOLUTION FOR CHANGE 27 (2011) (citing MARK COURTNEY ET AL., ISSUE

ideations and attempts, and had been suspended numerous times for disrespecting authority. On one occasion, he brought a pocket knife to school and showed it to a friend. His friend told the principal. When questioned about it, he informed the principal that he intended to harm himself, even revealing the elaborate plans he had made to do so. Rather than attempt to aid George with appropriate therapeutic and behavioral supports, the school's first response was to call the police and then refer him for expulsion.

Several days later, a manifestation determination review was held with George, the principal, his great-uncle (with whom he had been living for only a few months), a special education teacher, a general education teacher, a school psychologist and a therapist. George had only met the therapist one time a few days before the incident occurred. George had never met the school psychologist. No one raised the issue of George's prior hospitalizations or what George had disclosed to the principal. The Team decided that the incident was not a manifestation of his disability and that the school district should move forward with an expulsion.

As a result of the school's response to call law enforcement and its failure to implement the behavioral provisions of the IDEA properly, George became court-involved and was known throughout the school as a juvenile delinquent. Eventually, with a special education attorney's advocacy, the manifestation determination review decision was overturned. George received an FBA, a behavior intervention plan and mental health services to help him deal with his severe depression and psychosis. Had the school appropriately considered all of the relevant information about George's social, emotional and behavioral challenges at the manifestation determination review, George would not have lost over a year of much-needed educational supports and services and could have avoided the delinquency system altogether.

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BRIEF #102: THE EDUCATIONAL STATUS OF FOSTER CHILDREN, (2004); KATHLEEN MCNAUGHT, BREAKING DOWN CONFIDENTIALITY AND DECISION MAKING BARRIERS TO MEET THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE (2005)). There is also evidence to suggest that foster youth are recommended for special education because teachers and school staff have lower expectations of their academic achievement. *Id.* (citing Laura T. Sanchez Fowler et al., *The Association Between Externalizing Behavior Problems, Teacher-Student Relationship Quality, and Academic Performance in Young Urban Learners*, 33 BEHAV. DISORDERS 167 (2008)). Youth in foster care are three times more likely to be suspended or expelled from school than peers in the care of a guardian. See *Who's Getting Pushed Out?*, DIGNITY IN SCHOOLS, [http://www.dignityinschools.org/sites/default/files/DSCFactSheets\\_WhosGettingPushedout.pdf](http://www.dignityinschools.org/sites/default/files/DSCFactSheets_WhosGettingPushedout.pdf) (last visited Dec. 18, 2013).

Another exclusionary response is to send a child home from school without a formal suspension, which can have adverse consequences beyond being out of school. “Patty” was twelve years old and had been diagnosed with Post-Traumatic Stress Disorder (PTSD) and Attention Deficit Disorder (ADD). She had difficulty controlling her emotions and had frequent outbursts. Patty’s IEP provided her with accommodations to help with her attention deficits. She received pull-out services for certain academic areas in which she had difficulty remaining on task. She did not have a behavior plan in place or receive counseling services despite a report from an outside psychologist diagnosing her with PTSD. On one occasion, Patty began yelling and cursing at a teacher and was sent to the principal’s office. The principal decided to send her home and told her not to return for the rest of the week. Patty was sent home without any documentation indicating that she was being suspended. While on her way home, Patty received a ticket for truancy because she could not prove that she had been suspended. Patty’s advocates were able to put a behavior intervention plan in place along with counseling to help Patty control her outbursts. Nevertheless, she still had to work or do community service to pay off the truancy ticket and was labeled as a status offender.<sup>297</sup>

In our practices, we have also seen other common punitive and exclusionary responses, including parents being told not to bring their children back to school until they have a note from a psychologist or psychiatrist saying that they are safe to return, transferring children to alternative school settings that provide fewer services and often offer fewer hours of instruction, and sending children to emergency rooms or inpatient mental health facilities. More vigorous implementation of the strong statutory protections the IDEA offers children with social, emotional, and behavioral needs in school should make these exclusionary responses unnecessary. In drafting the IDEA, Congress aimed to ensure that schools meet the needs of these children.

In the cases of both George and Patty, if the IDEA’s behavior-related provisions had been faithfully implemented, their interactions with law enforcement could have been avoided. In George’s case, there were several intervention points that could have diverted him from a poor outcome. One such point occurred when the school called the police. If the school had fully investigated George’s

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297. Status offenses are those that, by legal definition, are unique to children in that an adult who acted in the same manner would not be subject to prosecution, such as truancy, ungovernability, curfew violations, underage drinking, or running away. Tulman & Lee, *supra* note 167, at 3; *see*, Tulman & Weck, *supra* note 67, at 877–79.

academic and behavioral history, it could have convened an IEP meeting immediately to discuss how to help him. Yet another missed opportunity occurred when the team convened the manifestation determination review. A therapist who knew George should have been included at the meeting; the principal should have disclosed the confidential information that George shared with her; and there should have been education provided to George's caregiver about the purpose of the meeting so that he knew the importance of discussing George's prior history. If the letter and spirit of the law were followed, George might not have been labeled a juvenile delinquent. He might not have developed feelings of alienation and isolation from school that arose because he felt as though his teachers turned their backs on him rather than attempting to help him.

In Patty's case, there were also missed opportunities to use the behavior-related provisions of the IDEA to offer her increased support and divert her from a poor outcome. Upon receiving notice of her PTSD, the school should have convened an IEP meeting to determine whether further assessments or additional services were necessary. Also, after the third or fourth outburst, the school should have seized the opportunity to conduct an FBA and develop a behavior intervention plan. Finally, school officials should have documented the suspensions. Had they done so on each occasion, they would have seen a pattern of behavior, which would have triggered the protections of the manifestation determination review. If Patty had received proper behavioral assessments and a proper behavior plan, she likely would not have been sent home and, thus, would not have had a record of truancy.

When schools adhere to the requirements of manifestation determination reviews, develop effective positive behavior intervention plans, and implement positive behavioral interventions and supports, rather than relying solely on punitive measures, children with disabilities who have social, emotional and behavioral challenges can be supported to remain in the classroom and can avoid juvenile detention and other poor outcomes.<sup>298</sup>

The case of Henry is an example of the positive outcomes that can result when a school implements the behavior-related provisions of

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298. "[R]esearch studies have shown that a properly orchestrated FBA leads to decreases in inappropriate and disruptive behaviors for children who have received an FBA and who have an active BIP." Villalba & Latus, *supra* note 277 at 450 (citing Mary. M. Quinn et al., *Putting Quality Functional Assessment into Practice in Schools: A Research Agenda on Behalf of E/BD Students*, 24 EDUC. & TREATMENT CHILD. 261(2001)).

the IDEA. In first grade, Henry was constantly making inappropriate comments, fidgeting, disrupting his peers and walking around the classroom. About two weeks into the school year, Henry's teacher told him that he had to remain in his seat and that he could not get up whenever he felt like it. In response, Henry turned to his friends and told them that he was going to "hit her with a car." When Henry's mother asked him whether he knew what would happen to the teacher if she was hit by a car, he responded by saying she would get sad, and then she will "get away" from him. He did not seem to understand the implications of his threat.

Several months into the school year, Henry made another alarming statement. The principal tried to stop him from running away from her and in response he told the principal that he was going to burn her. Henry's mother asked him what would happen if he really burned her and again he responded with, "she would be sad but leave me alone." His mother then requested that Henry be evaluated for special education. The school conducted a full evaluation of Henry, including an FBA, which revealed that his inappropriate behavior was consistent with an autism spectrum disorder. Henry was placed in a special class for autistic students and began receiving speech and language services, positive behavioral interventions that were documented in a behavior intervention plan, and social skills training. He continued to demonstrate some behaviors that are typical for a child with Autism, but he eventually made enough progress in acquiring behavioral self-regulation skills that he could participate in a general education classroom. With the support of a behavior specialist, he continued to make great strides in his social interactions.

### III. PRIORITIZING IMPLEMENTATION OF KEY IDEA PROVISIONS

Public schools' failure to provide appropriate special education services is certainly not the only factor contributing to the poor outcomes described in Part I.<sup>299</sup> Accordingly, it will take more than a single solution, even more than full compliance with the IDEA's key provisions, to help these students get back on a course toward progress.<sup>300</sup> Our experience suggests, however, that schools' failure to

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299. See, e.g., W. Norton Grubb, *Narrowing the Multiple Achievement Gaps in the United States: Eight Goals for the Long Haul*, in *NARROWING THE ACHIEVEMENT GAP: PERSPECTIVES AND STRATEGIES FOR CHALLENGING TIMES* 57 (Thomas B. Timar & Julie Maxwell-Jolly eds., 2012) (noting that achievement gaps—including those for students with disabilities—"are long-standing and have complex causes").

300. See *id.* (arguing that "the achievement gaps in this country will require many initiatives, carried out consistently over the long run").

address appropriately the disability-related needs of many students with social, emotional and behavioral challenges is a major contributing factor to these poor outcomes. We contend that implementation of the special education laws is a big part of the solution. We have seen through our advocacy that, when the key provisions discussed above—Child Find and Evaluations, the IEP Process, Related Services, and Behavior-Related Provisions—are implemented as the law intends, substantial educational progress is possible even for students with significant social, emotional and behavioral challenges.<sup>301</sup>

We acknowledge that there are likely multiple reasons why schools' and districts' implementation of these IDEA provisions is lacking. These reasons include inadequate resources, lack of infrastructure and support from SEAs, and incomplete understanding of the unique needs of many students and their families. While some in the advocacy community might assume that bad faith on the part of educators and administrators underlies the implementation failures described in this Article—and while such animus may indeed be present in particular instances—our operating assumption is that, on the whole, schools and districts want all of their students to achieve at high levels and are troubled by the poor outcomes experienced by many students with social, emotional and behavioral challenges.

This Article's intent has been to hold up a mirror of sorts: to show schools, districts, State Educational Agencies, and policymakers at the federal level the places where IDEA implementation is lacking for students with social, emotional and behavioral challenges. In an effort to guide the decision making of educators, policymakers and advocates as we all strive to improve outcomes for this group of highly vulnerable students, this Part sets out the focal points for reform that our clients' stories suggest would be most worthwhile. We do not offer a comprehensive set of revisions to the IDEA statute itself that would better serve low-income families such as our clients.<sup>302</sup> Nor do we discuss how the courts should (re)consider specific statutory interpretations of the IDEA.<sup>303</sup> Finally, it is not our intent to comment on how enforcement mechanisms might better

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301. In addition to sharing client stories that demonstrate the common implementation failures we observe in our practice, we have also endeavored to include positive stories that illustrate the power of the IDEA's provisions to turn things around for the children and families we represent.

302. See Rosenbaum, et al., *supra* note 28, at 155–62.

303. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, *supra*, note 25.

hold schools accountable.<sup>304</sup> Rather, we propose a specific set of reforms that are intended to facilitate implementation at the school level of those key IDEA provisions that hold the most promise for helping students with disabilities experiencing social, emotional, and behavioral challenges achieve success and avoid poor outcomes.<sup>305</sup> While there are undoubtedly many steps that schools and school districts could and should take to improve their implementation of IDEA, our endeavor is to help them prioritize their efforts by using our clients' experiences to zero in on the specific leverage points that, while relatively low-cost, nonetheless stand to make a significant difference for this highly vulnerable group of students.

### A. Suggestions for Improving Implementation

#### 1. *Increased Teacher Training, Awareness of Disabilities and Related Social, Emotional, and Behavioral Challenges, and the Need for Ongoing Professional Development*

Many of the poor outcomes discussed above could be ameliorated if general education teachers had a better understanding of disabilities and were better equipped with tools to help students with social, emotional and behavioral challenges.<sup>306</sup> This awareness and understanding of disabilities could be accomplished by building special education coursework into the undergraduate and graduate colleges of education curricula for those studying to be a general education teacher.<sup>307</sup> The curricula should include an understanding and awareness of many different disabilities, which would better prepare the general education teacher to identify potential red flags

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304. See, e.g., Bagenstos, *supra* note 26, at 30–32; Caruso, *supra* note 13, at 172; Pasachoff, *supra*, note 26, at 1416.

305. Like Professor Weber's proposed reforms regarding IDEA eligibility, "[t]he reforms suggested here are modest and represent restoration of the letter and spirit of IDEA, rather than its transformation." Weber, *supra* note 24, at 86–87.

306. One of us graduated from a graduate-level general education teacher preparation program and can personally attest to the lack of training on special education or disability-related issues; in the course of a twelve-month program, there were approximately two days in one educational psychology course where these issues were discussed.

307. Currently, there is no uniformity across states as to what is required in the content of teacher preparation programs. Some states require just one course in extensive support needs while others may require seven. There is also little consensus on what should be included in teacher preparation programs. See Monica Delano, et al., *Personnel Preparation: Recurring Challenges and the Need for Action to Ensure Access to General Education*, 33 RES. & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 232, 232–33 (2009).



that might suggest a child is in need of supports and services, including social, emotional, and behavioral red flags. The curricula should also include training on the needs of children with various disabilities, effective teaching strategies for addressing those needs, and an understanding of what special education law requires. Specifically, teachers need to be familiar with the following: how to identify children in need of services; how to timely refer children for an evaluation; the IEP process; the myriad of related services that exist; how to implement positive behavior supports and interventions; and the behavior-related provisions within the IDEA. By incorporating special education coursework into general education teacher preparation curricula, teachers will be better equipped to intervene early so that children with social, emotional and behavior challenges do not trend toward the poor outcomes discussed throughout this Article.

While pre-service training for teachers is important, it is equally important to continue the training and professional development in all of the areas identified above after they have been in the classroom for a period of time. Ongoing in-service training provides teachers with the resources and tools to identify children with disabilities earlier, and provides teaching strategies and behavior supports to more effectively help their students. Specifically, to improve outcomes for students with social, emotional and behavioral needs, professional development for teachers, administrators and staff should focus on the following areas: strategies for addressing students' behavioral health needs; crisis management; diversity and cultural sensitivity; building skills to help students develop safe, caring relationships with adults and peers; and developing relationships between school staff and families.<sup>308</sup>

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308. The Massachusetts legislature convened a task force to develop a framework for creating supportive school and district environments for students with social, emotional and behavioral needs. *See* MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., THE FINAL REPORT OF THE MASSACHUSETTS BEHAVIORAL HEALTH AND PUBLIC SCHOOLS TASK FORCE 3-4 (2011). The Task Force recommended the following topics for teacher training: creating a caring classroom community; strategies and approaches to improve instruction that support students who may be at risk for developing social, emotional or behavioral needs; and strategies to manage classroom behaviors. *See id.* app. A, p. 9. For administrators and school leaders, the Task Force recommended training on: ways to engage school staff in their role to support the well-being and healthy development of all students; ways to support the well-being of educators and behavioral health staff; ways to engage meaningfully a broad range of students and families in school planning and decision-making groups with staff; disciplinary approaches that balance accountability with an understanding of behavioral health needs of students; analyzing and using data to inform decision-making about services and interventions; developing flexible approaches that support

## 2. Ensuring Clarity and Timeliness in the Referral Process

Because teachers spend so much time with students, they are often in the best position to identify when children may be in need of assistance.<sup>309</sup> Many teachers have confided in us or our clients that they either were not aware of the referral process or did not feel supported in making referrals for special education. Some teachers have indicated that they feared losing their jobs or other repercussions if they made referrals. Some parents have also reported that they were counseled out of pursuing requests that their child be evaluated.<sup>310</sup> It seems that there is a culture in some schools to discourage teachers and parents from pursuing the evaluation process. Teachers should be empowered by school administration officials to refer children for special education evaluations, especially as an alternative to suspension, expulsion or calls to the police. Additionally, the referral process should be clearly articulated so that all parents, staff and teachers know exactly how and to whom to make the referral. Once the referral is made, parents should be provided

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external behavioral health providers who offer services in the school setting (e.g., making space available); and enabling administrators to help and support staff to build effective relationships with students and families. *See id.* app. A, pp. 8–9. For all staff, the Task Force recommended the following topics for professional development: helping students develop safe, caring relationships with adults and peers; supporting students to self-regulate their emotions, behaviors, and attention to achieve academic success; the ability to identify the early warning signs and variety of symptoms of students in distress including the impact of trauma and other environmental risk factors (e.g., stress, homelessness, violence) on learning, relationships, behavior, physical health, and well-being; knowledge of school-wide and individualized behavioral health approaches/services that help meet needs of at-risk students; specific knowledge of strategies and protocols to develop effective linkages and collaborations with external services; understanding the separate roles and common objectives of school staff and behavioral health providers that promote collaborative efforts and supportive school-wide environments; developing proficiency in de-escalation strategies and interventions that are alternatives to physical restraint; addressing the needs of diverse student populations, including specific training on cultural sensitivity to the needs of groups served by the school; increasing familiarity with relevant child and youth-serving systems, including state agencies and state-sponsored behavioral health resources and their potential intersections with education; discussing sensitive, confidential, and/or privileged student information; and training on crisis prevention, intervention and management, including identifying early signs of crisis to enable preventive actions. *See id.* app. A, pp. 7–8.

309. *See* Shum, *supra* note 250, at 256 (citing Mark D. Weist et al., *Collaboration Among the Education, Mental Health and Public Health Systems to Promote Youth Mental Health*, 52 PSYCHIATRIC SERV. 1348 (2001)).

310. In some states, like California, a request to evaluate must be in writing. *See* CAL. EDUC. CODE § 56029 (West 2003); CAL. CODE REGS. tit. 5, § 3021 (West, Westlaw through Dec. 2013). We have seen many cases in which parents made a request orally and were never told that the request needed to be in writing.

with the opportunity to sit down with school officials to understand what evaluations are being proposed, who will be conducting them, what the testing is designed to assess, and how the process will unfold.<sup>311</sup> By providing parents with this information, parents will understand what to expect at the upcoming Team meeting have an opportunity to articulate their own referral questions that can guide the inquiry of the evaluator.

### *3. Securing Comprehensive Evaluations that Include All Relevant Parties*

As demonstrated through our clients' stories, improper evaluations can negatively impact a child through the resulting delays in access to special education services or through the resulting provision of inadequate or inappropriate special education services. Accordingly, it is critical that *all* evaluations are conducted in a timely manner. Evaluations also must be comprehensive and assess the student in all areas of suspected disability. Specifically, evaluations should include assessments of a child's social, emotional and behavioral needs in addition to his academic needs when a student has exhibited those challenges. Because parents have information that can prove to be invaluable in determining a child's needs, an evaluation must consider input from the child's parent(s). If a child is a non-English speaker, the evaluation of the child must be conducted in her native language or the language most likely to yield accurate results. Families report that some schools use psychologists or other qualified evaluators who do not speak the family's native language and do not provide an interpreter to facilitate communication. The result is reliance on inaccurate information to create the evaluation report, which is critical to the development of the IEP that is adopted for the student.

When an evaluation is executed in accordance with the IDEA and the student is assessed in *all* areas of suspected disability, there will often be several different people evaluating that student. For example, there may be a speech therapist, occupational therapist, school psychologist, and a behaviorist, all of whom are evaluating the child to determine his needs. To maximize the effectiveness of the evaluation, the various professionals should share their findings with

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311. Massachusetts's special education regulations require that parents be given such an opportunity. See 603 MASS. CODE REGS. 28.04 (1)(c) (West, Westlaw through Dec. 2013) ("School districts shall provide the student's parents with an opportunity to consult with the Special Education Administrator or his/her designee to discuss the reasons for the referral, the content of the proposed evaluation, and the evaluators used.").

one another, which will be an asset to each of the evaluators as one professional may have learned information that can be helpful to another member of the evaluation team.

Finally, we have seen many evaluations that do not provide the Team with any recommendations for potential eligibility or related services or supports that might be helpful at school. To be truly comprehensive, the evaluations must contain recommendations that will aid the Team in developing the child's IEP.<sup>312</sup>

#### 4. *Collaboration with Parents Prior to the IEP Meeting*

In our experience, IEP meetings tend to be very confusing and overwhelming for parents because they often are confronted with unfamiliar information about their child that may be new or difficult to digest, or do not feel that their thoughts and opinions are being considered in the development of the IEP. This problem can be exacerbated by the rushed nature of most IEP meetings because school personnel tend to be under great time constraints. One way to address this issue is to allow parents to be a part of the pre-planning meetings that sometimes occur between the school staff as referenced in the section on the IEP Process above. Parents could either meet with the school staff in person or through telephone calls. If it is not feasible for the child's parents to participate in an additional meeting, school staff could send a note or form home to let the parents know what is being contemplated for their child. By including parents in an informal discussion, parents would have an added opportunity to feel that they are key members of the IEP Team. They would also have additional time, if desired, to gain clarity on the program that is being contemplated for their child. Moreover, school staff should be in close communication with parents about their child and his or her needs throughout the school year so that parents have already engaged with teachers regarding many of the issues that will arise at the IEP meeting. IEP meetings would be more effective and less confusing to parents if school staff and parents collaborated prior to

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312. Reports after a neuropsychological assessment should include: information about the child's strengths and weaknesses as a learner, an opinion about whether your child has a learning disorder or other developmental disorder, and practical recommendations for interventions at school and home. The goal is to identify the big picture of the child's strengths and weaknesses and to integrate this into an understanding of the whole child. See Aida Khan, Ph.D., *Assessment 101: Types of Evaluations*, WRIGHTSLAW, <http://www.wrightslaw.com/info/assessment.part2.khan.htm> (last updated Mar. 20, 2013).

the annual IEP meeting about the student's needs, progress, and other topics central to the IEP meeting.

*5. Guaranteeing the Necessary and Relevant Parties Attend the IEP Meeting*

Parents report that their availability to attend an IEP meeting is not solicited. Far too often, parents are told that the date and/or time cannot be changed, which can result either in a parent missing the meeting or work.<sup>313</sup> Parents are critical to the IEP process and must be in attendance, which means that the school should consult with the parent prior to setting the IEP day and time to ensure the parent's availability.<sup>314</sup>

Other individuals who should be present at an IEP meeting if the parent desires are the child's therapist, social worker, behaviorist, family's therapist, and any other outside agency representative working with the child and/or family to address her needs. Many times, these outside providers are not informed of the IEP meeting in a timely fashion or included in its scheduling. Parents typically are not aware that these professionals can be invited to the IEP meeting. To ensure a thorough and beneficial IEP, the school needs to discuss with the parent all of the professionals who may be invited to the IEP meeting and the importance of having those individuals there.

Although the IDEA requires school personnel who have authority to make decisions about placement and services to be present at IEP meetings,<sup>315</sup> we have experienced countless situations where the necessary district personnel are not in attendance. As a result, the conversation at the IEP meeting is restricted to certain resources that the school has available or those that were pre-approved. Without those necessary individuals with decision-making authority about

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313. A blog on ADHD reports that one of the reasons that parents feel left out of IEPs is that "meetings are hard to schedule for parents who may work day and night jobs to keep food on the table." Wayne Kalyn, *When IEP is a Four Letter Word*, ADDITUDEMAG.COM, [http://www.additudemag.com/adhdblogs\\_7/print/9435.html](http://www.additudemag.com/adhdblogs_7/print/9435.html), (last visited Dec. 18, 2013).

314. Many parents describe themselves as terrified and inarticulate.

Often, but not always, parents feel that their own observations or requests are given little weight and that decisions are based primarily on the recommendations of the professionals. Their own close relationship with the child is viewed as a liability rather than as an asset—a liability that renders their judgments inherently suspect. Some . . . described with consternation the tendency of the majority of parents to stop attending the annual review meetings after the first few years.

Engel, *supra* note 188, at 188.

315. See 20 U.S.C. § 1414 (d)(1)(B)(iv) (2012).

placement and services, the IEP Team cannot adequately address the *actual needs of the child* and meetings typically have to be continued, which delays the delivery of needed supports and services. This situation can be remedied if school districts ensure that the requisite personnel are at each IEP meeting.

6. *Ensuring Interpretation and Translation Are Available to Parents and Students*

Schools are required to provide interpreters at IEP meetings for parents who are hearing impaired or whose native language is one other than English to enable parents to participate fully in the meeting.<sup>316</sup> Too often, client families report that they have attended IEP meetings where there was no interpreter provided or a family member or staff member from the school was asked to interpret. When an unqualified person is interpreting, information is often missed or interpreted incorrectly.

In addition to ensuring that students are evaluated in their native language, it is critical that the language needs of a student who is not proficient in English be considered throughout the special education process.<sup>317</sup> Families state that they receive IEP documents or other notices in a language other than their native one and are then asked to sign something that they have not had the opportunity to read. By engaging in this practice, schools are undermining parents' ability to participate fully in the education of their child. To remedy this situation, schools need to provide *qualified* interpreters at IEP meetings, ensure that the person conducting an evaluation can either speak the family's native language or provide an interpreter, and provide all written communications, particularly IEP documents, in the family's native language.

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316. See 34 C.F.R. § 300.322(e) (2013).

317. See 20 U.S.C. § 1414(b)(3)(A)(ii). In its findings, Congress noted, The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

*Id.* § 1400(c)(11) (2012).

### 7. *More Creative Use of Related Services*

Based on our experience, related services for students with social, emotional and behavioral challenges tend to include counseling delivered through a pull-out service and not much else. While counseling is important, schools would better serve this population of students with more creative thinking about additional types of related services and varied delivery modalities. Examples of other services to consider include: educationally related mental health services, social skills classes, music therapy, therapeutic recreation services, behavior therapy, or sensory integration through occupational therapy, among others.<sup>318</sup> These services can be delivered in individual or small group sessions. They also can be delivered through both “pull-out” and “push-in” models, where appropriate. Working in smaller groups and through a “push-in” model can allow some students more opportunities to generalize the skills they have learned and help them feel more connected to their school community. With more service options and delivery modalities available to serve the individualized needs of students with social, emotional and behavioral needs, the risk of poor outcomes would likely decrease.

### 8. *Empowering Parents through Meaningful Training and Information*

While the IDEA requires that parents be informed of their rights,<sup>319</sup> most school districts simply provide parents with a booklet of procedural safeguards and may also give a brief overview of what is contained in that booklet.<sup>320</sup> Parents often report that the information they receive is overwhelming and that they do not fully understand their rights. Parents also report that they do not understand their child’s evaluations. This lack of information—and resulting lack of empowerment—leads to less effective outcomes for students in the

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318. See generally 34 C.F.R. § 300.34 (2013). For a more extensive list of examples of related services, see *Related Services—A Closer Look*, WRIGHTS LAW, [www.wrightslaw.com/info/relsvcs.indepth.htm](http://www.wrightslaw.com/info/relsvcs.indepth.htm) (last visited Dec. 18, 2013).

319. See 20 U.S.C. § 1415(d) (2012) (describing the notice of procedural safeguards that schools must provide to parents at least once per year); § 1415(b)(3) (describing the prior written notice that schools must provide to parents each time they propose or refuse to initiate or change the identification, evaluation or placement of a student).

320. For an example of a procedural safeguards notice, see *Parent’s Notice of Procedural Safeguards*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC. (Aug. 2013), <http://www.doe.mass.edu/sped/prb/pnps.pdf>.

special education process.<sup>321</sup> To address this concern, school districts or other agencies should conduct parent trainings so that: (1) parents are fully aware of their rights, (2) parents fully understand the IEP process, including what information is important for schools to consider and how to read evaluations, (3) parents fully understand what services can be offered rather than the preset menu of services that is typically offered, and (4) parents are fully informed about the importance of various professionals with whom the school should be working, such as therapists, social workers, and doctors.<sup>322</sup>

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321. See NAT'L RES. COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 338 (2002) (noting that in low-income minority communities "low parental empowerment" is likely to be detrimental to special education efficacy). The authors summarize the literature on parent advocacy, which shows that parents in these communities are often perceived by educators as "passive and uninvolved in the special education process." *Id.* at 339. Interestingly, a body of research indicates that "the responsibility for this pattern lies as much in the way discourse is structured by school personnel as in various logistical barriers faced by such parents." *Id.* (citations omitted). For example, one study found that school personnel made little effort to encourage parent participation at Team meetings and told them it would be fine just to mail in the signed paperwork; as a result, parents did not understand the importance of attending the meetings or that they could affect the outcome of their children's education. *Id.* (citing Beth Harry, et al., *Communication Versus Compliance: African-American Parents' Involvement in Special Education*, 61 EXCEPTIONAL CHILD. 364 (1995)).

322. Under the IDEA, the U.S. Department of Education awards grants to organizations that support parent training and information centers to help parents better understand the nature of their children's disabilities and their educational and developmental needs; communicate effectively with personnel responsible for providing special education, early intervention, and related services; participate in decision-making processes and the development of IEPs; obtain appropriate information about the range of options, programs, services, and resources available to assist children with disabilities and their families; understand the provision of IDEA for the education of, and the provision of early intervention services to, children with disabilities; and participate in school reform activities. See 20 U.S.C. § 1471(b) (2012). Although parent training and information centers are funded to help parents understand special education and the IEP process, we find that parents still lack the necessary information to fully participate in the education of their child. In many cases, parents are not aware that these centers exist. There needs to be a more coordinated effort between the schools, school districts, and the parent training and information centers to ensure that all parents are aware of the training offered at these centers. In areas where the centers do not exist, schools and school districts need to provide the necessary information to parents. Schools and school districts can direct parents to websites, such as [wrightslaw.com](http://wrightslaw.com), that provide information for parents in plain language rather than using education jargon. We also suggest that outside agencies and non-profits work alongside parent training and information centers to educate parents about their rights under the IDEA and to ensure that parents fully understand the IEP process. Regardless of which entity provides the education and information to parents, we would like to see more training that is specifically focused on addressing the issues that arise for children with social, emotional and behavioral challenges.



9. *Improved Understanding and Implementation of Behavior-Related Provisions*

Because failure to adhere to the behavior-related provisions within the IDEA can have such a negative effect on students with social, emotional and behavioral needs, schools should ensure that personnel are better trained in the complex discipline procedures and protections for students with disabilities. Specifically, school personnel should understand the concept of manifestation—that behaviors displayed by a student can be a manifestation of his or her disability and therefore should not lead to punishment. Schools should ensure that a thorough psycho-educational evaluation has been conducted recently and that an FBA has also been conducted (or updated) at the time of the manifestation determination review so that someone with actual expertise can determine whether a “substantial relationship” exists. School personnel need to decrease the use of punitive discipline responses and increase the use of positive and school-wide approaches. With these changes, students with social, emotional and behavioral needs will be excluded less frequently and achieve more success.

While these suggestions are not exhaustive, they certainly start the conversation about reform efforts that would better ensure implementation of key IDEA provisions—and hopefully obviate the need for costly and time-intensive enforcement mechanisms<sup>323</sup>—to yield better outcomes for students with social, emotional, and behavioral challenges.

**B. Addressing Some Critiques of Special Education and of IDEA**

Our experience as advocates suggests that improving implementation of key IDEA provisions as we have described above—so that more students at earlier points are afforded the law’s entitlements and protections—holds substantial promise for reducing the poor outcomes faced by many students with social, emotional and behavioral challenges. However, special education is not without its critics.<sup>324</sup> There are some who do not share our impulse that special

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323. See Rosenbaum, et al., *supra* note 28, at 113–44 (discussing how due process hearings and mediation are primarily used by wealthy families and those with financial means).

324. See *supra* notes 24–29 and accompanying text. See generally MARK G. KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1998) (questioning whether

education is a critical pathway to educational success for the group of students described in this Article.<sup>325</sup> Even dedicated champions of the law—such as ourselves—acknowledge some of its limitations; our view, however, is that we should not allow these shortcomings to be a convenient refuge for those who would seek to justify noncompliance with the current law, attempt to weaken its protections,<sup>326</sup> or foster a defeatist sense of complacency in the face of significant but surmountable challenges. Before concluding our Article, we briefly address here some legitimate concerns about special education that are important to monitor and avoid but that we argue do not diminish the value of properly implemented special education for the group of students and families for whom we advocate.

### 1. *The Problem of Stigma*

We share the concern of many policymakers and parents that special education can often constitute a source of stigma for those students who receive it.<sup>327</sup> The potential for stigma will only be reduced when schools take seriously the task of building school cultures where *all* students are taught—in words and by example—to value and appreciate difference in all its forms as a normal part of the human experience.<sup>328</sup> While that difficult work remains underway, the stigma associated with low achievement, school dropout, juvenile delinquency, and inpatient hospitalization can hardly be preferable to the stigma that may accompany receipt of specialized services in school, which can provide a path to greater independence and better outcomes in adulthood. Academic failure, behavior problems, and social challenges, in and of themselves, can be sources of stigma for

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students with learning disabilities deserve educational resources beyond those devoted to their classmates).

325. See, e.g., Beth A. Ferri, *Doing a (Dis)service: Reimagining Special Education from a Disability Studies Perspective*, in *HANDBOOK OF SOCIAL JUSTICE IN EDUCATION* 417 (William Ayers et al. eds., 2008) (“[S]pecial education ultimately functions not so much as a service to students with special needs, but also as a tool to shore up the exclusivity of general education—allowing it to maintain a false sense of homogeneity and a rigid set of normative practices that disempower an ever-increasing number of students.”).

326. See, e.g., SASHA PUDELSKI, AM. ASS’N OF SCH. ADM’RS, *RETHINKING SPECIAL EDUCATION DUE PROCESS: THE FIRST IN A SERIES OF REPORTS RELATED TO REAUTHORIZATION 4* (2013) (calling for elimination of the IDEA due process hearing).

327. On the subject of stigma, see generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

328. See, e.g., MARTHA L. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 30–31 (1990).

children regardless of whether they receive special education services to address these difficulties.<sup>329</sup> We often work with children who have been the targets of significant bullying even prior to being found eligible for IDEA services. Properly implemented, the evaluation and IEP development process provides a structure for helping students with disabilities develop the capacity to understand and respond to stigma they may encounter in school and in life.<sup>330</sup> The Least Restrictive Environment presumption reinforces the notion that students should be supported in every way possible to participate in the mainstream learning environment, including reducing the presence of stigma and bullying. Certainly, failing to identify students' needs and offer an appropriate education seems unlikely to eliminate the scourge of stigma that may accompany their perceived differences.<sup>331</sup>

## 2. Overrepresentation of Minority Students

We are also mindful of the fact that in many school districts special education is characterized by overrepresentation of minority students.<sup>332</sup> Data also show that these students are particularly overrepresented in certain disability categories, including emotional disturbance.<sup>333</sup> Among students identified as eligible, there are also

329. Weber, *supra* note 24, at 148.

330. Massachusetts explicitly requires that the IEP Teams of students with autism, students who have disabilities that affect social skills development, and students whose disabilities make them particularly vulnerable to bullying, harassment or teasing must "address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing." See MASS. ANN. LAWS ch. 71B, § 3 (LexisNexis 2013).

331. See MINOW, *supra* note 328, at 39 ("Shielding a minority or disabled child from community dislike may allow her to develop a sense of self-esteem but disable her from coping with that community—or from recognizing hostility when it comes her way.").

332. Congress took note of this fact in its 2004 reauthorization of IDEA. See 20 U.S.C. § 1400(c)(12)(B) (2012) ("More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population."); see also § 1400(c)(12)(E) ("Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education."). But see Christina Samuels, *Minorities in Special Education: Are They Underrepresented?*, EDUC. WEEK (Apr. 5, 2013), [http://blogs.edweek.org/edweek/speced/2013/04/minorities\\_in\\_special\\_educatio\\_1.html](http://blogs.edweek.org/edweek/speced/2013/04/minorities_in_special_educatio_1.html) (reporting on recent studies showing that minority children were less likely to receive special education services than similarly situated white peers).

333. African-American students in particular are overrepresented in the Emotional Disturbance category. See COLKER *supra* note 23, at 7 (citing federal Department of Education data from [www.ideadata.org](http://www.ideadata.org)).

racial disparities with respect to their educational placements: white students are overrepresented in inclusion placements where the majority of their time is spent learning in the general education classroom with non-disabled peers, whereas African-American students are overrepresented in substantially separate day schools where they have no exposure to mainstream classrooms.<sup>334</sup> While these patterns are undoubtedly concerning, we see them less as a function of the law's design than of the flawed implementation of referral and evaluation procedures discussed earlier in this Article. Redoubled efforts to evaluate children comprehensively will help to ensure that all students—including those who are members of racial minorities—are diagnosed and educated appropriately and are not placed unnecessarily in overly restrictive settings. Improving implementation of the IDEA's substantive and procedural provisions is preferable to fixing the overrepresentation problem artificially by failing to refer and identify students of color for the educational services they need.<sup>335</sup>

### 3. *Low-Quality Programs*

One reason why the overrepresentation of students of color in special education is so problematic is that many of the programs and services that students receive once they are identified as having disabilities are characterized by low quality and even lower

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334. More specifically, while white students constitute 52.3% of the total population of students receiving special education nationwide, they constitute 64.3% of students served in full inclusion placements (defined as spending greater than 80% of their time in the general education classroom). See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., OMB-1820-0517, DATA ANALYSIS SYSTEM (DANS): PART B, INDIVIDUALS WITH DISABILITIES EDUCATION ACT, IMPLEMENTATION OF FAPE REQUIREMENTS (2011) (original data on file with author) (data updated as of July 15, 2012). Conversely, while African-American students constitute 18.9% of the total population of students receiving special education services, they constitute 26.4% of the students in substantially separate day schools. *Id.*

335. For a thorough discussion of overrepresentation concerns and why some of them are misplaced, see Weber, *supra* note 24, at 149 ("If [reforms] keep children who are floundering in general education classes from a legal entitlement to assistance, the educational problems they encounter will simply become more intractable. Difficulties that students experience with the general education curriculum reflect problems that desperately need to be addressed. At the present time, the only system that confers an entitlement to services and the procedural protections to enforce the entitlement is the special education system."). For a contrasting view, which Professor Weber addresses at length, see Robert A. Garda, Jr., *The New IDEA- Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005).

expectations.<sup>336</sup> In our experience, the risk of low quality is particularly high when students with disabilities are placed in classrooms or schools that are separate from the mainstream general education environment. Data indicate that students with emotional impairments are particularly likely to be placed in restrictive settings—such as substantially separate classrooms, separate day schools, or residential schools—where they have little or no access to the mainstream.<sup>337</sup> There are certainly students who require more restrictive placements and we have seen many such placements that provide rich and rigorous learning opportunities that meet students' unique needs in creative and inspiring ways. We have also seen firsthand, however, the under-resourced and ineffective programs and classrooms that many districts offer to students with emotional disturbance. The latter are not what we have in mind when we talk about the potential for special education to be a salvation for students otherwise headed for poor outcomes. We should not accept the presumption that low-quality programs are inevitable. Instead, policymakers and school officials should work to ensure that high quality options exist for all students served under the IDEA. Allowing the threat of low quality to deter us from referring students for special education services as appropriate is allowing the system to benefit from its failure to ensure high quality instruction for all children with disabilities.

#### 4. Cost

Finally, we would be remiss if we did not acknowledge the cost associated with full implementation of the special education laws.<sup>338</sup>

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336. See, e.g., Marcus A. Winters & Jay P. Greene, *A Special Ed Fix*, N.Y. POST (Apr. 30, 2008) (expressing the view that “[t]oday’s public-school systems serve disabled students badly—all too often ‘warehousing’ them in special-education classes rather than providing a good education.”).

337. See MATTHEW DENINGER & ROBERT O'DONNELL, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., SPECIAL EDUCATION PLACEMENTS AND COSTS IN MASSACHUSETTS 9 (2009) (reporting data from the Massachusetts Department of Elementary and Secondary education showing that, while 8.4% of special education students in the state are classified as having an emotional impairment, 53.1% of students in separate public day schools, 38.1% of students in separate private day schools, and 29.3% of students in residential schools are students with an emotional impairment, and further showing that a full 57.0% of students classified as having an emotional impairment are placed in settings where they spend less than 20% of their day in a general education environment).

338. See COUNCIL FOR EXCEPTIONAL CHILDREN, 2010 POLICY MANUAL SECTION THREE—PART 1: BASIC COMMITMENTS AND RESPONSIBILITIES TO EXCEPTIONAL CHILDREN, at H-26 (2010), available at <https://www.cec.sped.org/~media/Files/Policy/CEC%20Professional%20Policies%20and%20Positions/policy%20manual.pdf>

A key reason for many of the implementation failures discussed above is simply that local officials do not have the requisite resources to comply fully with the letter and spirit of the law.<sup>339</sup> Capitalizing on the potential of special education to function as a deterrent to poor outcomes for students with social, emotional and behavioral challenges will entail a greater commitment of public resources. We believe this commitment to be justified and that it will result in cost savings in the long run. For example, the average cost of providing special education to a student with a disability is considerably less than the alternative cost generated when an underserved student becomes an inmate in a correctional facility.<sup>340</sup> The increased cost of the latter is especially pronounced when we consider not only the outright cost of incarceration, but also the cost to our economy of the unrealized productivity of those who are incarcerated.<sup>341</sup> We can rightfully think of the cost associated with special education as an investment that will pay for itself with future positive externalities. The cost associated with other more punitive systems is not an investment in this same sense. While the cost of special education has increased over time, the relative burden of special education compared to the cost of education generally has not risen

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(“Success of all education programs is dependent on the provision of adequate funding. This is essentially true of programs for children and youth with exceptionalities.”).

339. *See, e.g.*, AM. ASS’N SCH. ADMINISTRATORS, 2013 AASA LEGISLATIVE AGENDA 3 (2013), *available at* [http://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/files/2013%20AASA%20Leg%20Agenda%20Approved%2011213.pdf](http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/2013%20AASA%20Leg%20Agenda%20Approved%2011213.pdf) (calling for “mandatory funding for IDEA at 40 percent of the national average per-pupil expenditure”).

340. The average cost of incarceration is anywhere from \$32,000 to \$88,000 depending on the length of the stay and the location of the detention facility. *See* BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 10, *available at* [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) (last visited Dec. 18, 2013); *see also* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 19 (2011), *available at* [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf). In contrast, the average annual cost of educating a student with a disability is \$22,300. MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, AN OVERVIEW OF SPECIAL EDUCATION IN CALIFORNIA 6 (2013), <http://www.lao.ca.gov/reports/2013/edu/special-ed-primer/special-ed-primer-010313.pdf>.

341. For a discussion of economic resource costs, particularly lost productivity, associated with youth with untreated mental, emotional and behavioral disorders, *see generally* PREVENTING MENTAL, EMOTIONAL, AND BEHAVIORAL DISORDERS, *supra* note 36 at 248.

appreciably.<sup>342</sup> What has increased is the share of special education costs borne by local school districts, as opposed to by the federal and state governments.<sup>343</sup> A re-balancing of the distribution of special education costs would no doubt improve the ability of schools and districts to correct the implementation failures we have discussed in this Article.

### CONCLUSION

As demonstrated through our clients' experiences and in the academic literature, poor educational and life outcomes are more likely for those students with social, emotional, and behavioral challenges.<sup>344</sup> When fully implemented, the IDEA as a whole, and in particular, the key provisions identified in this article, can lead to more positive outcomes for all children, but specifically for this population of children. Early identification through the IDEA's child find and evaluation provisions helps ensure that the school is aware of the needed services for children with disabilities, prior to experiencing failure in school, repeated exclusion from school, or other bad outcomes. After the identification process is complete, the IEP process must then incorporate the recommendations and information gleaned from the evaluation process to implement a plan for student success. Part of that process should include services that are individually tailored to meet a student's unique needs and cannot be limited by a generic selection of stock services. Implementing positive behavior interventions and supports is equally important for student success. And if a student should exhibit behaviors that do not comport with school rules, adherence to the behavior related provisions of the IDEA will also further the likelihood of more

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342. See Marcus A. Winters & Jay P. Greene, *Debunking a Special Education Myth*, EDUC. NEXT, Spring 2007, at 70 ("While special education does consume more money over time, the relative financial burden of special education on public education has not increased because public schools are also receiving significantly more money.")

343. *Id.* Although Congress authorized expenditures of up to 40% of the total cost of special education, it has never come close to fully funding special education at this level; in FY12 it funded 16% of special education costs nationally, leaving states and localities to cover the remaining costs. See *Individuals with Disabilities Education Act—Funding Distribution*, FED. EDUC. BUDGET PROJECT (July 10, 2013), <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution>.

344. See Rosenbaum, et al., *supra* note 28, at 110 ("The data is mounting to support the thesis that students from families without resources are systematically deprived of educational outcomes that would allow them to pursue gainful employment or further educational opportunities.").

positive outcomes. Because all of these key provisions are designed to promote educational success for students with disabilities, full implementation of these important provisions will be more likely to divert children away from poor outcomes.

Special education is not a panacea. It is, however, an important and underutilized tool in our toolbox as we contemplate solutions to the seemingly intractable obstacles that currently face students with social, emotional and behavioral challenges. It would be a mistake to see the many shortcomings of special education and assume that it has no role to play in helping students remain in school and out of other more punitive and restrictive systems. As we look to new laws and new solutions, we would advocate immediately for a focus on ensuring the one that we have lives up to its potential. To paraphrase former President Clinton, there is nothing wrong with special education that cannot be cured by what is right with special education.<sup>345</sup> The purposes and premises underlying the IDEA are precisely those that ought to animate any approach to ensuring a more positive future for children with social, emotional and behavioral difficulties. We would do well by these children—and our society—to devote our attention and our resources to ensuring that they are fully realized.

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345. See William J. Clinton, *Inaugural Address*, AM. PRESIDENCY PROJECT (Jan. 20, 1993), <http://www.presidency.ucsb.edu/ws/?pid=46366#axzz2giQEtkFj>.